RELIGIOUS LIBERTY IN THE THOUGHT OF THE FOUNDING FATHERS

A study of the meaning and intent of the religion clause of the First Amendment to the Constitution

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TABLE OF CONTENTS

CHAPTER PAGE

CHAPTER PAGE

INTRODUCTION

In recent years, particularly within the present decade, there has been considerable furor raised by the public, by governmental leaders, and by the clergy of the country over decisions of the Supreme Court relative to what is described as religious freedom. There apparently is reason for such concern, inasmuch as the Supreme Court appears to be inconsistent in its many decisions in cases tried on the religion clause of the First Amendment.

Because much of the misunderstanding appears to be due to inadequate or improper interpretation of the religion clause, not only by the Supreme Court, but by specialists in constitutional law, educators, legislators, theologians, and by the public in general, this study has been undertaken with the intent of determining, insofar as it is possible from this distance in time, the meaning and intent of the leaders of the colonial and revolutionary governments of this country in drafting and adopting the Bill of Rights.

However, the scope of this study will be confined solely to the religion clause of the First Amendment; references to the Bill of Rights as a whole body of constitutional legislation will be only incidental.

In 1941, while serving as the Vice-President and Provost of the University of California at Berkeley, Monroe Deutsch wrote a monograph in which he traced the heritage of religious freedom enjoyed, though not always appreciated, by the citizens of the United States. The foreword of the book contains these significant words:

> There is no word which comes to our minds more frequently than does "liberty." This we and our fathers have repeated over and over again since Valley Forge. It is the first thing an American child learns to associate with his country. But just what is liberty? If it were only the right of newspapers to criticize the government or the privilege of assembling freely for political discussion, liberty would be very precious. Still we might legitimately wonder sometimes whether the defense of such matters, however desirable, would be worth heroic sacrifice. Liberty is much more than that--it is the right to be a man; and being a man means, fundamentally, being dedicated whole-heartedly to the best one knows and believes. Liberty is, in short, freedom of conscience.[1]

Freedom of conscience involves many factors, or nuances. It means being free to say what one thinks, and to write what one wants to write, fearlessly. It also means freedom of feeling, freedom to believe what one wants to believe, and freedom to express that belief in ways most meaningful to him. For those who believe in God, or a Supreme Being, whatever the name may be, this is religious liberty.

In an effort to arrive at an adequate understanding of the meaning and intent of the religion clause of the First Amendment, it is necessary to inquire into the meaning and significance of religious liberty. This can be effectively done only in studying the lives and thoughts of people who, down through the centuries, from a time long before the birth of this nation, fought and suffered for, bled and died for, the freedom to believe in and honor, worship and serve, God.

In order to gain perspective for a more detailed study of the thought and lives of the founding fathers of this country, a review of the historical antecedents preceding the American Revolution and the

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[1]Monroe Emanuel Deutsch, Our Legacy of Religious Freedom (New York: National Conference of Christians and Jews, 1941), p. i.

framing of the Constitution and the Bill of Rights is most helpful.

In the first chapter, therefore, this study traces the pilgrimage of those seekers after truth, the truth that makes men free. Beginning with the pre-Christian era of the Hebrews and the Greeks, it continues down through the early Christian and medieval periods, the Reformation, seventeenth century England, and into colonial America.

In the latter era, the study highlights the contributions of men like Roger Williams, William Penn, the Quakers and other dissenters. This sets the framework for the main purpose of the study, the history of the development of the First Amendment, in chapter II, and an analysis of the meaning and intent of the two parts of the religion clause, in chapter III.

Chapter II will review the climate for revolt, religious liberty in Virginia, the struggle for a constitution, the need for a Bill of Rights, the birth of the Bill of Rights, and the response in ratification.

Chapter III will consider the meaning and intent of an establishment, examining the views of some of the writers in the field, and suggesting a broader interpretation than most of them seem willing to grant. The second half of chapter III will review the meaning and intent of the free exercise phrase, utilizing the same method as that applied to an establishment. The chapter closes with a short summary of the meaning and intent of the religion clause as a whole.

Chapter IV, the concluding chapter of the study, presents a general observation on religion as a prelude to three conclusions

concerning: 1) The broader meaning of respecting an establishment of religion; 2) observations on religion versus church; and 3) the considerable ambiguity and ambivalence of the Supreme Court in applying the religion clause to contemporary situations. The conclusions are followed with implications in the areas of: 1) Religion and the public schools; 2) Aid to religious groups, churches, parochial schools; 3) Tax exemptions for churches, chaplaincies; 4) the rights of the majority and the rights of the minority.

The dissertation concludes with a plea for clarification of the question and includes some suggestions for approaching the problem. A possible clarifying amendment to the Constitution is included as an appendix.

CHAPTER I

HISTORICAL ANTECEDENTS

Insofar as freedom of conscience is related to man's zeal for freedom in general, one might say that the desire for religious liberty has its roots deep in human nature. Certainly it is to be found in the records of the ancient Hebrews, and in the writings of Greek and Roman philosophers. And in the centuries since that time, men have expressed in various ways a yearning for the right to believe what they want and to express such belief in the mode of worship and participation pleasing to them.

The First Amendment of the United States Constitution has been referred to by numerous writers as the turning point in the universal struggle for religious liberty. Admittedly, it was brought about by a series of unique circumstances and conditions, not the least of which was the birth of a new nation intent upon making possible for its citizens a degree of freedom they had never known before. But a document like the Constitution of the United States of America, not to mention an amendment such as the "First", doesn't just "happen". It is the result not only of the conscientious thought and untiring efforts of dedicated founders, but owes its formulation to a host of historical antecedents as well.

Some of these historical antecedents are veritable landmarks in the development of religious liberty. Others, though not too significant in their own right, had an important influence on the

course of events which led up to the formation and adoption of the First Amendment. To renumerate all these would require a work of the magnitude of Anson Phelps Stokes' Church and State in the United States and it is impossible within the limitations of a dissertation.

However, there are some events in history which are of such vital influence upon the course of the development of that religious liberty which is expressed so succinctly, yet so expansively, in the First Amendment that they must be considered. This is particularly true if one is seeking an understanding of the purpose and intent of the amendment with respect to religious liberty.

PRE - CHRISTIAN PERIOD

Certainly freedom of conscience, and religious liberty, its foremost expression, finds its early rumblings in the history of the Hebrew people, going back to a period in history twelve hundred years before the coming of Christ. The Mosaic law, typified in the Decalogue, was the basis of the moral law of Israel, and served not only to prick but also to spur the conscience of the people. And recorded experiences of the three men in the fiery furnace, and of Daniel in the lion's den, are witness to the claims that the God of the Hebrews made upon the people.

Hebrew

The Hebrew emphasis upon the sovereignty of God recognizes that he is the ultimate source of all authority, and that what a man believes finds expression in what a man does. In the face of a

demanding God, man must be responsible. The government of the Hebrews was a theocracy, and this influenced the formation of the new, young government in America. The prophets also cried out against any distortion of religion by people who did not conduct themselves in keeping with the will of God.

Greek Philosophers

A second major influence moving in the direction of freedom of thought and conscience is to be found in the Greek philosophers. Plato's defense of Socrates is a significant testimony to the place of intellectual and spiritual freedom in the life and thought of men. He emphasized the importance of freedom of inquiry, and at the same time freedom of criticism (on the part of an interested citizenry) toward public figures and their acts.

However, of the famous Greek philosophers, Aristotle is the most renowned for his effect upon the history of thought. By common consent, he is one of the greatest thinkers of all time. He emphasized scientific method, and the importance of ethical concern and conduct, as well as the importance of democratic procedures in government. His thought profoundly influenced the theology of the Catholic Church during the middle ages, not only in logic, but also in the natural sciences. Thomas Jefferson acknowledged Aristotle's influence in the development of ideas on personal liberty and considered them to be first among those which touched the revolutionary mind in colonial America.

Much of the Greek philosophy influenced the Roman Stoics and,

through them, the apostle Paul. Zeno and Cleanthes (c. 300 B.C.) emphasized the importance of human brotherhood and through Cicero, Paul, Seneca, Marcus Aurelius and others, profoundly affected later philosophers, especially John Locke.

EARLY CHRISTIAN PERIOD

The strongest influence on the development of the idea of human liberty, and of religious liberty in particular, comes from the New Testament and the early Church. Authentic Christianity emphasizes the infinite worth of personality and the sanctity of individual conscience. It rejects any attempt to enforce the control of thought, particularly in matters involving the relationship between man and his creator. It cannot be denied that the ideals of true democracy and freedom of conscience are indebted to Jesus and his teachings for their declaration and implementation. For Jesus not only taught the ideal of infinite worth in mankind; he also demonstrated it by his life and death. Paul--more than any of the other early apostles--advanced the cause of Christ and prevented Christianity from remaining a Jewish sect. By his earnest zeal and missionary effort, he developed the universal application of the gospel, making it available to all who would accept it. Paul treated religious liberty in a political sense--distinguishing bondmen from freemen--and also emphasized freedom of conscience, freedom from numerous types of bondage, and freedom of the will. His letter to the Galatians is ample testimony to the greatness of his thought, and to the scope of his vision.

It is within the history of the Christian Church that the greatest number of singular events have occurred which had a direct effect in developing the attitude and climate which made subsequent events possible. The sacrificial giving of themselves has hallowed the memories of a number of Christian leaders who have advanced the cause of religious liberty and--more than any other--provided the background and encouragement for the founding of a nation based upon the principles of individual freedom and liberty of conscience. It is important for our understanding of the First Amendment to give careful consideration to the life and thought of those who have thus made their imprint upon the pages of religious liberty.

The temper of toleration which advanced the cause of religious liberty--despite numerous setbacks--to the enactment of the American Constitution and Bill of Rights--first revealed itself in the Edict of Constantine in 313 A.D. Philip Schaff[1] observes that this edict was remarkable--as compared with edicts of a similar nature of later date--for its "advanced position". In several passages it anticipates the modern theory of religious liberty, recognizing as it does that every man has the right to choose his religion and mode of worship, according to the dictates of his own conscience.

Augustine of Hippo (354-430) proved to be a mixed blessing to the development of religious liberty. Living as he did in the latter half of the same century that saw Constantine issue his edict of

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[1]Philip Schaff, The Progress of Religious Freedom (New York: Scribner, 1889), p.5.

toleration, Augustine was at that time a firm advocate of religious liberty. Unfortunately for the future of the Church, however, he changed in his later years, abandoning the principle of liberty of conscience and seeking the aid of civil power against the Donatists.[2] (The Donatists, while adhering to the orthodox doctrine of the Church, rejected the authority of the Church because they considered it "impure" in allowing the sacraments to be administered by those who were guilty of committing the "deadly sins". Augustine succeeded in winning many of them back into the church, but finally, calling a conference in 411 A.D., arbitrated by an imperial delegate, he demanded and achieved the outlawing of the movement.)[3]

This action more or less set the stage for the intolerance practiced subsequently by the Roman Catholic Church. In her attempt to affirm the "truth inherited from the saints" the Church insisted that the vessel be inviolable. All threats thereto must be suppressed, even though it require the help of the state to do it. The medieval Church virtually nullified the freedom granted by Constantine, making subsequent martyrdom and additional specific "toleration acts" necessary.

MEDIEVAL CHRISTIAN PERIOD

A bright light of this same period, however, was Francis of

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[2]Williston Walker, A History of the Christian Church (New York: Scribner, 1942), p. 283.

[3]Andrew C. Zenos, Compendium of Church History (Philadelphia: Presbyterian Board of Christian Education, 1938), pp. 103, 104.

Assisi (1182-1226). A young man at the turn of the twelfth and thirteenth centuries, he championed the cause of the common man, and his Franciscan movement was full of hope for the masses. He virtually rediscovered Christianity as an experience in which the humblest might participate as they sought to emulate the spirit of Christ. Still his compassion and example were not enough to influence the Church to any alteration--least of all abandonment--of its intolerance.

Aquinas

Thomas Aquinas lived and taught in the middle years of the thirteenth century (1225-1274). He was in the tradition of Augustine so far as his doctrine of the Church was concerned. He recognized the necessity of the State, but insisted that all civil authority is derived from God; therefore the Church is the "soul" of the State and should direct it. Even though he opposed strongly the idea that the individual exists for the State, he held to the supremacy of the Church, and in this sense was an encouragement to the intolerance practiced by the Church.

Renaissance

The Renaissance saw the beginnings of a recognition at least of the worth and dignity of the individual, thereby pointing the way to democracy. However, the Church's methods remained autocratic. The later years of this period produced some great leaders, perhaps the greatest of whom was Erasmus. Although he wrote very little about toleration, he certainly practiced it, and attacked intolerance. He

opposed dogmatism in every form. To him any manner of persecution was unchristian; he preferred education and persuasion rather than force. He provided a real service to the Christian religion by giving the world its first printed Greek Testament in 1516. With this both Roman Catholic and Reformed theologians could go back for the first time to the teachings of Christ and the apostles in the original Greek, and they could correct the errors of the Latin versions.

A truly bright light of the Renaissance was Jan Hus, the Bohemian pastor of the Bethlehem Chapel in old Prague, and Rector of the University of Prague. His flaming body, burning at the stake on July 6, 1415, was the torch that lighted the way to the Reformation which was to blaze forth a little over a century later in Germany and Switzerland. His was a horrifying and utterly unnecessary martyrdom, but a sacrifice that rendered significant support to the cause of religious liberty in the years to come.

He insisted upon the primacy of Scripture as the authority for the faithful. No one could go beyond Scripture--the source of all truth and the rule of faith. Hus insisted on the right and freedom of individual interpretation of the Scriptures, and affirmed the belief that was later--in the Reformation--to be heralded as "the priesthood of all believers"; every believer has direct access to God without priestly intermediation.

> I confess that I desire nothing but simply to believe, hold, preach and assert as faith which is necessary to salvation, unless I have the following theological demonstration: "Thus the sacred Scriptures have declared explicitly or implicitly, therefore we should thus believe, hold and assert it as faith." Accordingly,

> I humbly accord faith, i.e., trust, to the holy Scriptures, desiring to hold, believe and assert whatever is contained in them as long as I have breath in me.[4]

So Hus affirmed as he stood before the Council of Constance.

He lived his life by the precept: "Faithful Christian, seek the truth, hear the truth, learn the truth, defend the truth to the death, for the truth will liberate you from eternal death."[5]

Hus' witness is a landmark in the struggle for religious liberty. "His unyielding devotion to the truth which he held to the end, the purity and integrity of his character, and his unswerving loyalty to the Church universal--the body of Christ--raised him morally above all his conciliar judges, and particularly above his Czech foes. He remained faithful to his oft-asserted conviction that 'Truth conquers all!'[6]

REFORMATION PERIOD

Following the testimony of a Christian like Jan Hus the Reformation was bound to come. Little need be said about the firm stand of Martin Luther against the Roman prelate, nor of the convictions which placed John Calvin--alongside Luther--in the vanguard of that long-awaited movement toward religious liberty. Let it suffice to remind

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[4]Quoted by Matthew Spinka, 550 Years of Jan Hus' Witness 1415-1965 (Geneva: World Alliance of Reformed Churches, 1965), p.2.

[5]Ibid., p.4.

[6]Ibid., p.5.

ourselves that it was the Protestant movement as such that provided the strongest impetus to religious liberty in their new land.

It was largely because of the activity of a number of sects (groups such as the Anabaptists, the Mennonites, the Moravians, the Waldensians, the Quakers, the Huguenots, and the like) that the later toleration acts were enacted. In France, following the Reformation, the Huguenots were being denied their right to worship other than as the Roman Catholic Church decreed.

Henry of Navarre, though a nominal Roman Catholic himself, decided in 1598 to grant toleration to the Huguenots. Perhaps it should be noted in passing that "toleration" is not in any sense true "liberty". The former is a concession; the latter is a right. One is a matter of expediency; the other a matter of principle. Such "edicts of toleration" therefore, were grants of the civil government, authorizing religious societies dissenting from the state religion to worship according to the dictates of conscience without being liable to persecution. It might be described as an intermediate state between religious persecution and religious liberty.

It was so with the Edict of Nantes granted by Henry IV to the Huguenots. They were granted full personal liberty in any part of France, without molestation because of their religious opinions, and were made eligible to all secular offices of trust, honor or emolument. However, their public worship was restricted to certain cities and places where it had been recently (1596-97) maintained; it was forbidden in Paris and in a prescribed area around that city.

Unfortunately for the cause of religious liberty, the Edict was revoked by King Louis XIV in 1685. One hundred and two years later toleration was restored in an edict of Louis XVI.

ENGLAND

Toleration fared somewhat better in England. The Magna Carta in 1215 set the framework for responsible government and freedom of the people, and a "Bill of Rights" enacted in 1689 took the first step in recognizing that government belongs to the people. It proved to be one of the main foundations of those "rights of Englishmen" which the American colonists claimed for themselves, and was influential in the framing of the Virginia Bill of Rights and ultimately the First Amendment.

Bill of Rights

But along with the English Bill of Rights under William and Mary there was enacted the first of a series of "toleration acts". The Act of Toleration of 1689 was a fortunate result of the revolution that put William and Mary on the throne of England. Cromwell and Milton had advocated the right of separate assemblies outside the established church, and this particular act guaranteed this right.

Toleration Acts

It was followed in 1693 by the "Act for Settling the Quiet and Peace of the Church", providing for admission of Presbyterian ministers to regular status in Scotland. Schaff observed that the Acts "fall far

short of our modern ideas of religious liberty, and by their limiting and exclusive clauses may be termed rather an Act of Intolerance against the Unitarians and Roman Catholics."[7] But it stopped the persecution which had plagued England during four generations, which had cost precious lives and untold sufferings, and sent thousands of men to loathsome prisons. And as the political difficulties diminished and the prospects of re-Romanizing of the country vanished, public opinion gradually changed in favor of the civil and religious rights of all peoples, including the Roman Catholics. The Catholic Emancipation Act of 1829, under the reign of George IV finally made this an accomplished fact.

Concurrent with the toleration acts and edicts mentioned above, the age of enlightenment produced influential philosophers whose thought and pens had much to do with the progress of religious liberty. These included such men as Rene Descartes, Francois de Voltaire, and, particularly, John Locke. Living during the last two-thirds of the seventeenth century, Locke probably had the most significant effect upon the founders of this nation--Thomas Jefferson, James Madison, and others.

John Locke

Locke's most important contribution to the thinking of these founders was his Essay on Toleration written in 1667. He was impressed

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[7]Schaff, op. cit., p. 73.

by the religious discords of his time and felt that the problem centered in the power of the clergy. He felt that the church and the magistrates have separate and distinct authority and responsibility, and that neither should impinge upon the other. He considered toleration to be the chief characteristic of the true Church. Some pertinent excerpts from his Essay serve to demonstrate the importance of it for freedom of conscience.

> No man can be a Christian without charity and without that faith which works, not by force, but by love. The whole jurisdiction of the magistrate neither can nor ought in any manner to be extended to the salvation of souls. . . the care of souls is not committed to the civil magistrate, any more than to other men. . . It appears not that God has ever given any such authority to one man over another as to compel anyone to his religion. . . the care of souls cannot belong to the civil magistrate because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God.[8]

Locke acknowledged that the Church must be governed by some sort of "order", but that such order be confined to its own members. Its "authority" is ecclesiastical, and therefore should be confined within the bounds of the Church, and never should be extended to civil affairs, since the Church itself is absolutely separate and distinct from the commonwealth. The true Church should maintain peace and good will toward all men--both those who differ in faith and worship and those who agree with it.

Magistrates have a like responsibility for toleration. They ought to tolerate the churches, "for the business of these assemblies

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[8]John Locke, "A Letter Concerning Toleration", Great Books of the Western World, XXXV, 4.

of the people is nothing but what is lawful for every man"; no one can be forced to worship, nor can the use of such rites and ceremonies already in use and practices by the Church be forbidden. "If truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her."[9]

Locke thought that every man should enjoy the same rights as any other. If each--the Church and the State--would but contain itself within its own bounds--one attending to the salvation of souls--the other to the worldly welfare of the people--no discord would be possible.

COLONIAL AMERICA

Moving now to the situation in colonial America which contributed to the necessity of the constitutional guarantees of religious freedom, we realize that persecuted Puritans, Pilgrims, Huguenots, Quakers, Presbyterians, and others who loved religion more than their native land, were the spiritual fathers of the American Republic.

The movement toward religious liberty found its beginnings in Massachusetts, Virginia, and Pennsylvania, soon after the Declaration of Independence and prior to the framing of the Constitution. It was supported and successfully brought to fruition by Dissenters, Baptists, Quakers, Presbyterians and others, working largely independently, but cooperating with each other at times when resisting the established church.

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[9]Ibid., p. 15.

One important stream of religious independence involved the Pilgrims of Plymouth and the Puritans of Massachusetts Bay. The former were more liberal and less theocratic than the latter, and expressed a far greater degree of democratic spirit. But the Puritans developed their influence to a point where it dominated the New England colonies, and were of an intolerant type, strongly Calvinistic, which developed a close relationship between Church and state. This goes back to 1631 when the Massachusetts General Court decreed that "No man shall be admitted to the freedom of this body politic, but such as are members of some of the churches within the limits of same."[10] So did the government of the colony come under the influence of the clergy, a fact which harbored no good for religious liberty.

It took the outspoken views of certain latter-day prophets to offset this rigid determinism which hampered the separation of Church and state. In the main the ministers of the Massachusetts Bay colonies opposed--often with considerable bitterness--the separation of Congregationalism from the state. But among those who were not so like-minded were Roger Williams (the most outspoken of the dissenters), Thomas Hooker, John Clarke, Jonathan Mayhew and others.

A beloved leader of the Puritans, John Robinson, unfortunately died in the Netherlands (1625) before he was able to leave for the colonies. Had he lived, the situation in New England might have resolved itself much earlier than was actually the case. He had said:

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[10]Anson Phelps Stokes, Church and State in the United States (New York: Harper & Bros., 1960), I, 156.

> It is no property of religion to compel to religion what ought to be taken up freely; that no man is forced by Christians against his will, seeing that he that wants faith and devotion is unserviceable to God. . .[11]

The Puritans had left England largely to secure religious freedom, but once there they moved in the direction of upholding their own prerogatives and privileges and denied a like freedom to those who taught otherwise.

Roger Williams

From the moment he arrived in New England, it was apparent that Roger Williams was going to be at odds with the Church there. Warmly welcomed as "a good minister" by Governor John Winthrop, he was asked to supply the pulpit of John Wilson of Boston, who was taking a trip to England. But Williams found the assignment distasteful to him on two counts: it had not separated itself from the Church of England, and apparently assumed control over the individual conscience. Consequently in less than three months he had moved to Plymouth to assist Ralph Smith. But three years later, on the death of Samuel Skelton, he became teacher at Salem. Although the Boston magistrate protested, and tried to nullify the appointment, the church at Salem had come to cherish the right of self-government (under Williams' tutelage), and did not listen to the objections.

Williams contended that the civil powers should have no authority whatsoever over the consciences of men. But some of his

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[11] Ibid., I, 160.

protestations bore negative political implications (such as his assertion that Charles I had no right to charter the colony since the land belonged to the Indians and not to the king), and he was made to answer in the general court of Boston. He was ordered to depart from Massachusetts and in 1636 he joined a settlement on the banks of the Mooshausic River and named it "Providence". At his prompting the settlers agreed to submit themselves to the will of the majority "only in civil matters".

Under the influence of the Anabaptists Williams accepted immersion and in 1639 organized the first Baptist church in Providence (subsequently known as the "mother" of eighteen thousand such churches on the continent of America).

Typical of the pressures and indignities to which he and other "dissenters" were subjected was a tract written in the early days of New England under the euphemistic title of The Simple Cobler of AGGAWAM in America.[12] Presuming to speak for "us New-English", the Reverend Nathaniel Ward, using a pseudonym, eschewed all relationships with "Familists, Antinomians, Anabaptists". Such "adversaries of the truth" do not have any blessing of God which would permit their toleration by "Christian States". His heart

> naturally detested four things: The standing of the Apocrypha in the Bible; Forainers swelling in my Country, to crowd out Native Subjects into the corners of the Earth; Alchymized Coines; Tolerations of divers Religions, or of one Religion in segregant

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[12]Nathaniel Ward, The Simple Cobler of AGGAWAM in America (Boston: Henchman, 1713), p. 6.

> shapes: He that willingly assents to the last, if he examines his heart by day-light, his Conscience will tell him, he is either an Atheist, or an Heretick, or an Hypocrite, or at best a captive to some Lust: Poly-piety is the greatest impiety in the World.[13]

The tract writer had a dim view of any who were willing to tolerate any religion besides his own. They would have to be doubtful of their own convictions, or, at best, insincere in them. And anyone "willing to tolerate any unsound Opinion, that his own may also be tolerated, though never so sound, will for a need hang God's Bible at the Devil's girdle."[14]

Nevertheless, despite multiple opposition of this sort, and worse, Williams continued to dissent. His was truly an "independent spirit". Ultimately he repudiated the necessity for immersion and severed his connection with the Baptists. Thereafter he became a "seeker", and his sense of religious toleration widened and acquired strength.

Among his unusual accomplishments was a "painful, patient spirit" which enabled him to live among the Indians, learning their language and then writing a book about it, interpreting their language for the settlers and for posterity.

He also seems to have made the acquaintance of John Milton, on one of his return visits to England, and Milton was evidently much impressed with him, speaking of him as an extraordinary man and a noble confessor of religious liberty.

His doctrine of liberty evidently seemed extreme at times,

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[13] Ibid., p. 7. [14] Ibid., p. 9.

particularly in its enunciation and application, but such is to be expected of a prophet. Governor Bradford spoke of him as a godly and zealous man, "having many precious parts", but "very unsettled in judgment". Cotton Mather, with whom he had many an altercation, spoke of him as "having a windmill in his head".

When the Quakers made their appearance in New England, in 1656, and were cruelly persecuted in most of the colonies, they found refuge in Rhode Island. There, despite the opposition from Massachusetts and elsewhere, Williams steadily refused to lend his influence either to expel or to persecute them, even though he held their views in great abhorrence.

His foremost assertion was that "there is no other prudent Christian way of preserving peace in the world but by permission of different conscience". In the colonies he was one of the first to take a firm stand on the principle and to make serious effort to put it into practice.

The Bloudy Tenent of Persecution was one of Williams' expositions of his well-known position with respect to freedom of conscience. A quotation or two from this treatise serves to demonstrate his very strong feelings on the matter:

> An enforced uniformity of religion throughout a nation or civil state, confounds the Civil and Religious, denies the principles of Christianity and civility.
>
> I acknowledge that to molest any person, Jew or Gentile, for either professing doctrine, or practicing worship merely

> religious or spiritual, it is to persecute him, and such a person (whatever his doctrine or practice be true or false) suffereth persecution for conscience.[15]

Maryland

Parenthetically speaking, Maryland should be remembered for the efforts of its founder, Lord Baltimore (George Calvert), in the area of religious freedom. At his urging the colony adopted the Maryland Toleration Act in 1649, a historic document in the struggle for liberty of conscience. Although it fell short of Lord Baltimore's own practice of liberty, it was fairly liberal, considering the practices of the day in other colonies. Recognizing that efforts to control conscience in matters involving religion were becoming a menace and threatening the peace and quiet of government in the colony, the Act asserted that anyone professing a belief in Jesus Christ was not to be in any way troubled or denied. Residents of the colony were to be granted free exercise of their religion, and were not to be compelled to believe or practice any other religion, as long as they remained faithful to the "Lord Proprietary", and did not "molest or conspire against the civil government".[16]

It is quite evident from the wording of the document that the Act assumed Maryland to be primarily, if not solely, a Christian state,

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[15]Joseph L. Blau, Cornerstones of Religious Freedom in America (Boston: Beacon Press, 1949), pp. 36; 42.

[16]Edward Frank Humphrey (ed.), Liberty Documents (New York: National Conference of Christians and Jews, 1936), p. 7.

and therefore did not allow for the toleration of any non-Christian faiths or sects. This might at first glance appear deplorable, but it is to be remembered that this was back in the early days of the colonies, and even with its limitations the Act was quite liberal for its day. It was a limited "toleration" of Christian sects only, but pointed the way to religious liberty.

Pennsylvania

Pennsylvania from its early beginnings thought in terms of freedom of conscience. The efforts of William Penn were particularly noteworthy. For its day, the attitude of that colony was relatively liberal, due mainly to his "Frame of Government" of 1683, which welcomed all citizens to full rights "who profess to believe in Jesus Christ". And despite what seems to be a limiting stipulation, William Penn insisted from the very beginning that all religious views must be permitted freely to be preached and practiced.

Penn wrote a treatise entitled "The Great Case of Liberty of Conscience", in which he affirmed that such liberty meant "the free and uninterrupted exercise of our conscience, in that way of worship we are most clearly persuaded God requires us to serve Him in, without endangering our undoubted birth-right of English freedom." Furthermore he felt this to be not only "liberty of mind" (with respect to what one believes or disbelieves), but the practice of individual and corporate worship. "By imposition, restraint, and persecution, we mean this much, 'any coercive let or hindrance to us, from meeting together to

perform those religious exercises which are according to our faith and persuasion'."[17]

The treatise ends with this plea:

> Liberty of Conscience, as thus stated and defended, we ask, as our undoubted right by the law of God, of nature, and of our own country. It has often been promised; we have long waited for it; we have writ much, and suffered in its defence, and have many true complaints, but found little or no redress. . . We hold no principle destructive of the English government. We plead for no such Dissenter (if such there be). We desire the temporal and eternal happiness of all persons (in submission to the divine will of God), heartily forgiving our cruel persecutors. We shall engage, by God's assistance, to lead peaceable, just and industrious lives amongst men, to the good and example of all.[18]

Such views of religious liberty had far-reaching developments. Pennsylvania today is still the home of multitudinous sects which trace their beginnings back to the Protestant Reformation in Germany.

Virginia

Virginia was the third colony where stirrings of religious liberty arose to affect the subsequent development of constitutional guarantees. During the early Colonial period the Church of England was the "established" church. All residents were required to contribute to the support of the Anglican clergy in providing their salary. The clergy were also provided with revenue from glebe lands (parcels of land allocated to the church for a parish house or for cultivation). The ministers kept close to the English civil officials, seeking their approbation as well as their protection. This, in turn, required commitments of loyalty which many, if not most, of the settlers found

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[17] Ibid., p. 57. [18] Ibid., p. 67.

difficulty in tolerating. Such a situation made convergence of the religious and the political inevitable.

Dissenters in the Colony, mostly Presbyterians and Baptists, were most critical of the Anglican clergy, and at the same time deplored what they considered to be a lack of piety and faithfulness to the gospel. The situation was most difficult and complex, and with the move toward independence disestablishment became increasingly imperative. The hold which the established church had on the religious life of the community was difficult to dislodge. It was to be done not without considerable struggle.

Men who became famous for their revolutionary spirit eventually brought the widely shared dream of religious liberty in Virginia to reality. Names like Patrick Henry, James Madison, Thomas Jefferson and George Mason were prominent in the struggle. Their contribution will be considered in more detail in the next chapter of this study.

The struggle for disestablishment in Virginia paralleled the fight for freedom of conscience waged by the leaders of the new, young government which was being formed once independence was declared. The slow but steady victory in Virginia heightened the possibility of success at the federal level.

New York

It might be mentioned in passing that New Amsterdam or New York contributed in an interesting way to the colonial struggle for religious liberty. In the early seventeenth century, Peter Stuyvesant, who was governor of New Amsterdam and unfriendly to Quakers (because

their street meetings and disregard for authority offended him), banished to Holland a Quaker named John Browne. But the governing authorities of Amsterdam were more tolerant than the colony, and after hearing Browne's arguments, allowed him to return. This effectively quelled Stuyvesant's resistance; he was later ashamed of his departure from the Dutch tradition of religious toleration.

Almost as if in recognition of the spirit of toleration in New Amsterdam, when the British acquired it and re-named it New York, in 1664, King Charles II instructed his governor to permit all persons of whatever religion, to quietly inhabit within his government without disturbance by reason of their differing opinions in matters of religion. Such was one of the most heartening official statements of religious liberty in early American history, and was granted by the crown without any agitation on the part of the colony.

The foregoing are what might be considered as some of the major antecedents to the constitutional guarantees of religious liberty enjoyed by the United States today. The implications of some of these, particularly those which developed out of our own colonial experience, for the meaning or interpretation of the First Amendment, will be examined more closely as this inquiry proceeds.

CHAPTER II

THE BACKGROUND AND DEVELOPMENT OF THE FIRST AMENDMENT

The historical antecedents to the First Amendment highlighted the efforts in the colonies which attempted to resist the pressure and power of established churches. Resistance took its most active and persistent form in New England and Virginia, with other colonies making feebler attempts to avoid the possibility of persecution for religious reasons. The overall result was something of a limited toleration which allowed for differences in religious belief and practice but did little or nothing to help those smaller groups or sects which felt restricted by the churches having the majority.

"Toleration", as defined by Webster, "is an attitude of the governing officials which permits the existence and practice of all religious opinions and modes of worship differing from the established church." In other words, "toleration" simply "endured" the presence of other religious beliefs and supported the right of individual judgment in religious faith and practice. Even though such variant beliefs were not generally accepted, they were permitted.

Toleration is, however, a far cry from liberty. The colonists finally reached the point where they realized that liberty was absolutely necessary; that is, "liberty" in the broadest sense, which, of course, included religious liberty. The latter more specifically related to freedom of conscience, which required that all persons be free to think what they wanted to think about matters of faith and

belief without interference or restraint from others and especially from government. The fervent desire for the achievement and guarantee of such freedom from government oppression was one of the considerations that persuaded the colonies to revolt. The same zeal made them persist in writing such guarantees into the documents which they adopted to guide their new government. Toleration was not enough. True liberty (freedom of conscience) was absolutely essential to life and its living.

CLIMATE FOR REVOLT

The more overt causes of the American Revolution are well known to the people of this nation. They have heard it from their history studies back in elementary school; the oppressive taxes "without representation", the petty and pecuniary measures of repression exercised by many of the Crown's magistrates, the housing of troops in private homes, the search and seizure tactics of the military, to mention a few. These furnished the growing climate for revolt with specific, trying events which triggered the encounter between the British and the militia, touching off the Revolutionary War.

However, there were more subtle forces which motivated the resistance. These were factors having to do with liberty; the freedom to speak out against injustice, to criticize the unfair practices of the administration, to print freely in the press the attitudes and feelings of the people when their fundamental rights were threatened, freedom to meet together peaceably to discuss matters pertaining to the

common welfare, and freedom for anyone, anywhere, to worship how he pleased, and not be required to contribute financially to the support of religious causes with which he did not agree. The denial of all these "freedoms" nurtured the growing unrest of the populace and the ultimate distrust of any government which is allowed to become too powerful. These denials were caught up succinctly in Patrick Henry's famous cry for independence given before the Virginia House of Burgesses.

This study is concerned primarily with the struggle for that freedom of conscience which has to do with the religious feelings of the people of the colonial and revolutionary era. What was the religious climate in the colonies when the revolt began?

Town Meeting

In New England a town meeting had been held in Boston on November 20, 1772. It set forth the natural rights of New England colonies, deducing three fundamental rights from the concept of self-preservation; the right to life, the right to liberty, and the right to own property. Any oppression of these rights, be they civil or religious, constitutes a denial thereof and cannot be tolerated. With respect to religious liberty the Meeting averred:

> As neither reason requires nor religion permits the contrary, every man living in or out of a state of civil society has a right peaceably and quietly to worship God according to the dictates of his conscience.[1]

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[1]Edward Frank Humphrey (ed.), Liberty Documents (New York: National Conference of Christians and Jews, 1936), p. 11.

It was recognized that such liberty is rightfully extended to any and all religions so long as these do not subvert society.

This action of the Town Meeting, however, did not seem to have much effect upon the established church in Massachusetts. The Baptists, in the tradition of Roger Williams, still had to struggle for the freedom not only to worship as they pleased, but also to resist having to pay for the support of the establishment through taxes.

Isaac Backus

Perhaps the most active protagonist for religious freedom in New England during the revolutionary days was Isaac Backus (1724-1806). He was the natural successor to Roger Williams in his persistent struggle against the established church. Representing the Baptists of Massachusetts and Rhode Island, he took his fight to the Continental Congress (to which he was a delegate) in Philadelphia, September, 1774. He spoke on behalf of a Memorial presented by the Baptists to every member of that first Congress:

> It has been said by a celebrated writer in politics, that but two things were worth contending for--Religion and Liberty. For the latter we are at present nobly exerting ourselves through all this extensive continent; and surely no one whose bosom feels the patriotic glow in behalf of civil liberty, can remain torpid to the more ennobling flame of Religious Freedom.[2]

Earlier in that year he had written to John Adams expressing his views on the matter of taxation as it related to religious freedom. Recognizing that representation and taxation are concomitants he asked John Adams:

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[2]Ibid., p. 9.

> ...since people do not vote for representatives in our legislature from ecclesiastical qualifications...how can representatives thus chosen have any right to impose ecclesiastical taxes? ...They assume a power to compel each town and parish ... to settle a minister, and have empowered the majority of the inhabitants to give away as much of their neighbor's estate as they please to their minister. ...taxes laid by the British Parliament upon America are not more contrary to civil freedom, than these taxes are to the very nature of liberty of conscience...[3]

Backus made little progress with the Continental Congress, however. It was concerned more with the denial of freedom in general, particularly as it related to keeping a standing army in some of the colonies, as well as other threats to liberty. The questions raised there by him, therefore, were not dealt with, although his efforts did serve to raise up to the forthcoming national level the question of religious liberty.

Perhaps the refusal of the Continental Congress to consider his requests suggested to Backus that the collective efforts of the Congress predicted a future posture of non-interference with the inner workings of individual colonies. In any case, he took his fight back to Massachusetts, and six years later, when the Revolution was in full swing, that state adopted her first Constitution. Included in the Constitution was a Declaration of Rights which wrestled with the questions of religious freedom and the relations of church and state.

The Declaration noted the right of everyone to worship a Supreme Being according to the dictates of his own conscience, and

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[3]Edward Frank Humphrey, Nationalism and Religion in America, 1774-1789 (Boston: Chipman, 1924), p. 363.

affirmed the right and duty of all men to so worship. The Convention felt so strongly about the latter that public support of worship, as well as of public teachers of piety, was written into the Declaration as a requirement for all towns, parishes and precincts, etc. And although this was to be done in such a way as to support any and all sects or denominations, in actual practice the courts' interpretations denied the equality which the Declaration intended. Religious freedom was not yet complete, but was moving in that direction, finally culminating in complete disestablishment in 1833.

The Massachusetts concern for both religious freedom and the encouragement of religion by the government found its way into the Northwest Ordinance of 1787, which was adopted by the Continental Congress for the purpose of encouraging westward migration and settlement. The pertinent article stated that "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[4] Madison opposed this article and, significantly, such provisions were never duplicated following the adoption of the Constitution and the Bill of Rights.

Limited Toleration

Maryland had been colonized by Roman Catholics, but early in its history it tolerated non-Catholics. However, non-Christians were

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[4]R. Freeman Butts, The American Tradition in Religion and Education (Boston: Beacon Press, 1950), pp. 70-71.

denied this religious immunity. And when Puritans moved up from Virginia, along with other Protestants from different colonies, and finally out-numbered the Catholics, they took away all political rights from the Catholics, recognizing freedom of worship as belonging to Protestants only.

This kind of "limited toleration" was also found in other colonies. New Jersey and Pennsylvania, for example, enacted statutes which denied Roman Catholics equal political status with the Protestants. In the latter colony anyone aspiring to public office was required to assert his denial of Roman Catholic doctrines.

RELIGIOUS LIBERTY IN VIRGINIA

It is of utmost importance to an understanding of the meaning and intent of the First Amendment in the federal Bill of Rights that the development of the concept, the principle, of religious liberty into actuality through careful, thoughtful and hard-won legislation be traced both in Virginia and the Continental Congress.

In Virginia, from the founding of the colony, the Church of England was the established church. As such, it wielded considerable power, having a hold on the colony which was difficult to dislodge. It was not until just prior to the revolution that any degree of toleration was allowed. This came about in the 1760s through the efforts of the Presbyterians, with the aid of the Baptists. Like toleration in New England at this period, it was quite limited.

Prior to 1776 the Church of England in Virginia was carefully

protected by statute. Except for the instance on the part of the dissenters (largely Presbyterians and Baptists) that freedom to preach without interference from the established church be allowed, there was little direct challenge to the establishment. No one sought its disestablishment, nor were there any protests against the state taxation for the support of religion.

But in 1776 the Virginia Convention set the stage for the development of religious liberty in the emerging state. The very first Legislature of the new Commonwealth of Virginia legislated away all laws punishing persons for their religious beliefs, and exempted non-Anglicans from having to pay taxes for the support of the Church of England.

Meeting in Williamsburg in June, it adopted a constitution of three parts: a Bill of Rights, a Declaration of Independence, and a Frame of Government. Included in the Bill of Rights (which was drafted by George Mason), was an article (16) intended to assure freedom of religion. Patrick Henry first initiated the principle in the Virginia legislature, with the following statement:

> That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force or violence; and, therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under the color of religion, any man disturb the peace, the happiness, or the safety of society; and that it is the mutual duty of all to practice Christian forbearance, love, and charity toward each other.[5]

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[5]Kate Mason Rowland, The Life of George Mason (New York: Putnam, 1892), I, appendix x.

Jefferson and Madison

To Thomas Jefferson and James Madison belong the credit for integrating the principle of religious liberty into the structure for the new government during and following the revolution. This began with them, however, in their own state of Virginia, where both worked diligently, prior to, during the framing of, and following the adoption of the federal Constitution.

It is impossible to say which of the two, Jefferson or Madison, contributed more to bringing religious liberty from cherished dream to realized actuality, both in the federal government and in their own state of Virginia. Both had keen and perceptive minds. Both were notable for their zeal for freedom of conscience and the right of the people to govern themselves.

Jefferson possessed an analytical mind which found expression both in law and in architecture, as well as in government, the kind of a mind which could draft a Declaration of Independence (both for Virginia and later for the new republic). He regarded his part in the cause of religious liberty as one of the three most memorable actions of his career (the other two being the Declaration of Independence and the founding--and designing--of the University of Virginia), and desired that these three only serve as his epitaph.

Madison was also a scholar, and apparently was adept in meditation, conciliation, arbitration, and in general bringing together opposing views into an agreeable compromise which permitted progress to be made. This was particularly notable in the struggle for developing

a workable Constitution which would be meaningful and acceptable to all sides. He was a voluminous writer, and his correspondence with his contemporaries reveals his genuine concern and unflagging zeal for freedom of conscience and religious liberty. His penetrating insight into the "rightness" of things was demonstrated in his motion to amend the article 16 mentioned above. He proposed to replace the phrase, "all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience", with "all men are equally entitled to the free exercise of religion, according to the dictates of conscience". This may seem like a fine distinction, unless it is remembered that mere "toleration" is far removed from "equality" in the consideration of fundamental "inalienable" rights.

Both men were vitally essential to bringing about the formulation of religious liberty into workable, acceptable statutes. Perhaps it would not be far from the mark to say that Jefferson was the architect and Madison the contractor in building religious liberty into the Commonwealth of Virginia and into the emerging young nation.

Prior to the adoption of its Declaration of Rights in 1776 (p. 32), Virginia accepted the Church of England as the established church. It has already been noted (p. 31) that no effort was made to undo the establishement. Nor did the new Declaration carry with it the end of the establishment. Almost another decade was required before total disestablishment became a reality.

Presbyterian "Memorial"

The opening wedge in ending establishment was a "memorial" from

the Presbytery of Hanover to the legislature, on October 24, 1776, scarcely four months after the adoption of the Declaration.[6] In this "memorial" the Presbyterians of Virginia affirmed their intent to live peaceably with their neighbors under the civil government, even to the extent of submitting to "ecclesiastical burdens and restrictions". But with the pressure of oppression by England making necessary a common struggle to shed the "yoke of tyranny", they assumed that the time had come for freedom from all religious restrictions which denied freedom of conscience.

The "memorial" went on to affirm the new Declaration of Rights as the very "Magna Carta of the Commonwealth", relying upon it to secure for all "the free exercise of religion according to the dictates of their consciences". The dissenters particularly were aggrieved by having to purchase glebes and support the established clergy. Religious establishments are ever injurious to the general interest, and the gospel certainly does not need any civil aid. Furthermore, the function of civil government is to contribute to the happiness and protection of the people, to provide security of life, liberty and property, and to "restrain the vicious and encourage the virtuous by wholesome laws".

> In this enlightened age, and in a land where all are united in the most strenuous efforts to be free, they hope and expect that their representatives will cheerfully concur in removing every species of religious as well as civil bondage. . . earnestly entreating that all laws now in force in this Common-

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[6]Mark de Wolfe Howe, Cases on Church and State (Cambridge: Harvard University Press, 1952), p. 3.

> wealth which countenance religious dominations may be speedily repealed, that all and every religious sect may be protected in the full exercise of their several modes of worship, and exempted from the payment of all taxes for the support of any church whatever. . . .[7]

Thus did the Presbyterians in Virginia assert their claim for religious liberty--for complete freedom of conscience.

This reminder to the Legislature produced the desired results. The very same month it passed a law which released all dissenters, regardless of the sect to which they belonged, from any taxes, levies or attachments having to do with supporting and/or maintaining the Episcopal Church in Virginia. The same statute accorded the established church the glebe lands already deeded to that Church, but the Legislature deferred until later consideration the question of a "general assessment" to be prorated amongst the sects for the support of their respective ministers.

Repeal of English Laws

On December 5, 1776, the Legislature passed a bill repealing the English laws (heretofore applied to Virginia) making heresy or absence from worship a crime, stating that hereafter it would be of "no force or validity" in the Commonwealth. But the "general assessment" question was not decided until 1779 when the Legislature took up the matter without further deferment and voted against any such assessment.

At this time Thomas Jefferson proposed an "Act For Establishing

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[7] Ibid., pp. 4,5.

Religious Freedom", which asserted, among other things, that any efforts to restrict the freedom of man's mind were a departure from the "Holy Author of our religion", that men should be free to assert and maintain their religious opinions and that such should not in any way impair their civil rights, and that any legislation impairing these would infringe upon a "natural right".

Except for its assistance to the passage of the law against "general assessment", the proposed "act" encountered considerable opposition. Although the majority of the settlers in Virginia at that time were "dissenters" of various persuasion, the leadership in the Legislature was largely "pro-establishment", so that any legislation restricting the established church was most difficult to pass. It was not until 1784 that Jefferson's opportunity finally came.

Religious Assessment

In that year Patrick Henry introduced a bill that would levy a tax upon people for the support of Christian education. In essence it assumed that "the people of the Commonwealth according to their respective abilities ought to pay a moderate tax or contribution for the support of the Christian religion, or some Christian Church, denomination, or communion of Christians, or of some form of Christian worship."[8]

The proposal had enough support to get a committee appointed

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[8]Anson Phelps Stokes, Church and State in the United States (New York: Harper & Bros., 1960), I, 164.

to draft the bill, and there was a general expectation that it would be adopted. But the members did not reckon with the opposition. Though relatively small in number, it was extremely powerful because of its very able and energetic leaders--Jefferson and Madison. The latter felt so strongly opposed to the whole idea of the state supporting any religious body (in this case the Episcopal, essentially), that he wrote a brilliant and moving protest against the bill.

A letter written by Madison ten years before, when he was twenty-three, to William Bradford of Philadelphia, a classmate at the College of New Jersey, reveals his early distaste for any religious "establishment".

> Union of religious sentiments begets surprising confidence, and ecclesiastical establishments tend to great ignorance and corruption, all of which facilitates the execution of mischievous projects. . . Poverty and luxury prevail (in Virginia) among all sorts: pride, ignorance and knavery among the priesthood, and vice and wickedness among the laity. . . That diabolical, hell-conceived principle of persecution rages among some; and, to their eternal infamy, the clergy can furnish their quota of imps for such business. This vexes me the worst of anything whatever. . . So I must beg you to pity me, and pray for the liberty of conscience.[9]

Madison "Memorial"

Madison's zeal for religious liberty never left him, and enabled him to compose his Memorial and Remonstrance on the Religious Rights of Man, striking thereby one of the most significant blows against "establishment". In it he gave cogent arguments to support the

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[9]James Madison, Letters and Other Writings (Philadelphia: Lippincott, 1865), III, 10.

right to freedom of conscience as one of the inalienable rights of man (cf. Virginia Declaration of Rights, 1776), that interference by the states in matters of religion violates principles of equality, that state establishments do not further true religion or strengthen civil government, and that generally laws invading the religious rights of free men lead to the weakening of all rights.[10] In a letter to Thomas Jefferson he spoke of the proposed bill as "chiefly obnoxious on account of its dishonorable principle and dangerous tendency."[11]

In light of his support of the Baptists' right to preach in Virginia, it may seem strange that Patrick Henry would espouse such a bill. But his attitude is evidence of the concern held by many of the able statesmen who led the colonists in the founding of their new nation. Virtually all of them felt that religion was vital to the well being of mankind and particularly wanted to see it encouraged and perpetuated amongst the people. In the main they were "for religion", though they were generally opposed to the religious "establishment"--that is, the institutional church.

Madison's Remonstrance was eminently successful in arresting the progress of the proposed tax bill through the Legislature. In a letter to a grandson of George Mason (1826), Madison gave due credit to Colonel Mason for having suggested that a remonstrance against the bill be prepared, stating that he (Madison) was "imposed upon to draw up

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[10]Saul E. Padover, The Complete Madison (New York: Harper & Bros., 1953), p. 300 ff.

[11]Madison, op. cit., III, 131.

such a paper". (Until this particular letter came to light, it was generally thought that Mason had written the Remonstrance.) Madison then went on to say:

> The draught having received their sanction, a large number of printed copies were distributed, and so extensively signed by the people of every religious denomination, that at the ensuing session the projected measure was entirely frustrated, and under the influence of the public sentiment thus manifested the celebrated bill 'Establishing Religious Freedom' created into a permanent barrier against future attempts on the rights of conscience, as declared in the great charter prefixed to the Constitution of the State.[12]

Colonel Mason sent a printed copy of the Remonstrance to General George Washington (without identifying its authorship) and asked him to support the sentiments therein by affixing his signature. Before being able to read it, Washington replied, ". . . I wish that an assessment had never been agitated, and as it has gone so far, that the bill could die an easy death. . ."[13] Although more restrained than some of the other opponents, Washington made it quite clear that he favored complete freedom of religious thought without aid or abetment from the state.

Thomas Jefferson was in France when the debate on the Assessment Bill took place. Madison kept him informed, however, even sending him a copy of the Remonstrance for his perusal. With this he observed that the Presbyterian clergy were strongly opposed, doubtless because of pressure from their laity, "being moved either by a fear of

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[12]Rowland, op. cit., II, 87.

[13]Ibid., II, 89.

their laity or a jealousy of the Episcopalians".

When the Virginia Legislature convened in the fall of 1785, it was greeted with numerous petitions opposing the Assessment. Some twelve hundred citizens filed petitions in favor of the Bill, but over ten thousand signatures supported anti-assessment petitions, representing fortyeight counties (in contrast to nine counties supporting it).

Jefferson's Act

The defeat of the proposed Assessment Bill provided Madison with the opportunity for reviving legislation for establishing religious freedom which Jefferson had proposed in 1779. Had Jefferson not been away in France he doubtless would have pushed the advantage, but Madison proved to be an able associate, successfully legislating the Act for Establishing Religious Freedom through to its adoption in January of 1786.

This Virginia legislation became a critical part of the struggle for religious freedom which ensued in the development of the federal Constitution, then concurrently under way in the Continental Congress. For this reason it is helpful in our understanding of this struggle to review the pertinent features or highlights of the Act.

The opening statement sets the tone or rationale of the matter:

> I. WHEREAS, Almighty God hath created the mind free; that all attempts to influence it by temporal punishments and burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercion on either, as was His

> Almighty power to do; that the impious presumption of legislators and rulers, civil and ecclesiastical . . . have assumed dominion over the faith of others . . . ; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor . . . ; that our civil rights have no dependence on our religious opinions, . . . ; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right; that it tends only to corrupt the principles of that religion it is meant to encourage . . . ; and finally, that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error . . .[14]

The above sets forth the rationale for the urgency of establishing such an Act, and had it been adopted in 1779 when first proposed, the intended Assessment Bill never would have been attempted. The second part of the Act contains the specific "enactment" thereof:

> II. Be it enacted by the General Assembly, that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[15]

Jefferson realized, as did Madison, that such an act by a specific legislature could not be irrevocable should a later legislature decide to change or revoke it, and therefore included a statement calculated to persuade any and all of the critical necessity

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[14]Howe, op. cit., pp. 7-8.

[15]Ibid., p. 8.

of maintaining it. ". . . if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."[16]

That Jefferson was well pleased with the passage of his Act for Establishing Religious Freedom goes almost without saying. Not long afterward he wrote Madison from France:

> The Virginia act for religious freedom has been received with infinite approbation in Europe, and propagated with enthusiasm. I do not mean by the governments, but by the individuals who compose them. It has been translated into French and Italian, has been sent to most of the courts of Europe, and has been the best evidence of the falsehood of those reports which stated us to be in anarchy. It is inserted in the new Encyclopedie, and is appearing in most of the publications respecting America. In fact, it is comfortable to see the standard of reason at length erected, after so many ages, during which the human mind has been held in vassalage by kings, priests, and nobles; and it is honorable for us, to have produced the first legislature who had the courage to declare, that the reason of man may be trusted with the formation of his own opinions.[17]

The passage of this Act had the effect of finally "disestablishing" the "state Church" in Virginia, and although it did not exert sufficient influence upon the thinking of the Continental Congress to persuade the inclusion of "religious liberty" in the Constitution adopted the following year (1787), it did suggest the possibility of a rough passage for that document unless adequate provisions and safeguards were insured for the eventual enactment of legislation guaranteeing such freedom from intrusion by the new

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[16] Ibid.

[17] Thomas Jefferson, The Writings (Washington: Taylor & Mawry, 1853), III, 66, 67.

federal government upon the conscience of its citizenry.

With this background of action within representative individual colonies a clearer understanding of the struggle for constitutional religious liberty is possible. This struggle will now be analyzed.

THE STRUGGLE FOR A CONSTITUTION

The emergence of this nation had its administrative beginning in the Continental Congress which first met in 1774--a cooperative effort of the thirteen original colonies. Although it was too busy with other matters to give its collective ear and support to Isaac Backus (see p. 28), as the imminent revolution became more real (independence declared, 1776), it began to think about the "rights and privileges" which were being threatened and even denied by the British Crown.

Articles of Confederation

On November 15, 1777,[18] the Congress adopted the Articles of Confederation, which contained, among other things, the affirmation of a common bond between the thirteen colonies for the securing of their respective liberties, and resisting any attacks upon them "on account of religion, sovereignty, trade, or any other pretence".

The Articles are significant for any study of the struggle for religious liberty because they are the first written articulation of

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[18]Finally ratified by the thirteenth state, Maryland, March 1, 1781.

the "sovereignty" of the several colonies with respect, particularly, to matters of conscience. It is clear that each colony not only desired the integrity of its own religious freedom, but felt obligated to observe a similar integrity for each of its sister colonies. This mutual "interdependence and independence" found later expression in the phraseology of the federal constitution and the early amendments thereto.

The Articles provided something of a national unity, but nothing in the way of a strong central government; indeed, it is doubtful that the Congress even thought in terms of "strong central government" at that time. But as the War for Independence progressed and victory was achieved (October 19, 1781) the Congress began to see the need for a more integrated, practical, functional government for the new republic. George Washington considered the Articles to be but a "shadow without substance".

Constitution Adopted

Under the pressure of agitation for something more positive and forceful in the way of federal government, the Continental Congress called a special "constitutional convention" for the purpose of revising the Articles. As the convention progressed, however, it became apparent that a "revision" would not do; an entirely new statement or document was needed. Consequently, in Philadelphia, on September 17, 1787, the new Constitution was born. The required majority necessary for ratification was accomplished by the ninth state on March 4, 1789, and by May 29, 1790, all thirteen states had

voted ratification.

Delay in Ratification

Why was there all the delay in ratification? It is most significant for an understanding of the first amendment that the attitude of the states be examined. Ratification of the Constitution did not come easily, and Rhode Island was the last to ratify. Indeed, she was at first so opposed to the document because of its lack of guarantee of religious liberty, that she refused to participate in the Convention, sending no representatives to it.

The Constitution as first adopted contained only one reference to religion. This is in the closing sentence of the sixth article: ". . . but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." With all the furor over freedom of religion which preceded the struggle for independence, it may seem strange that the organizing document should omit all but this single reference to it. Possibly the framers of the Constitution considered the statements in the Declaration of Independence adequately covered such considerations.[19] The Convention may have decided that the less said about religion in a political document the better, since no one could then accuse the new government of "medling in matters of religion". In other words, they "bent over backward", so to speak, to keep the issue of religious liberty safely

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[19] *Cf.* second paragraph, Declaration of Independence.

outside the central government, thus leaving it to the states. And though some have suggested that the omission of religious concern reflects a secular, rather than a religious attitude on the part of the Founding Fathers, the position of the latter, both private and public, refutes this, as will be seen in the development of the present study.

But whatever reason, or reasons, the absence from the Constitution of expressed safeguards for religious liberty delayed ratification of the document until positive assurance of enabling amendments was given by the Convention. Some of the states were greatly concerned about other omissions as well, but the religious issue was by far the most serious. Thus, in order to grasp the significance of this resistance, it is helpful to consider the nature of these protests.

Virginia, which had set the tone of religious liberty with the passage of her Act Establishing Religious Freedom in 1779, was therefore most insistent upon a similar safeguard being included in the Constitution. In a letter to James Madison early in 1788 (as the Constitution was in the process of winning ratification), Joseph Spencer wrote as follows:

> . . . in a General way the Baptus's, the Prechers of that society are much alarm'd fearing Religious liberty is not sufficiently secur'd they pretend to other objections but that I think is the Principle objection, could that be Removed by sum one Caperble of the Task, I think they would

> become friends to it, that body of people has become very formible in pint of Elections, as I can think of no Gentle of my Acquaintance so suitable to the task as your self, I have taken the liberty to Request it of you.[20]

Spencer was asking Madison to push for religious freedom being written into the Constitution as being vital to ratification. At Madison's request he sent a list of his objections to the federal Constitution, amongst which were the following:

> 1. There is no Bill of Rights, whenever a Number of men enter into a state of Socity, a Number of individual Rights must be given up to Socity, but there should always be a memorial of those not surrendered, otherwise every natural & domestic Right becomes alienable, which raises Tyranny at once, & this is as necessary in one Form of Government as in another. . . .
> 10. What is dearest of all--religious Liberty, is not sufficiently secured. . . & if the Manners of People are so far Corrupted, that they cannot live by republican principles, it is very Dangerous leaving Religious Liberty at their Mercy.[21]

Ratification of the Constitution was not accomplished by a vote of the people in their respective states, but,rather, by the legislatures of those states taking appropriate action. The Virginia Legislature, in sending its ratification to the Convention, included, among its requests and specifications, the following:

> Subsequent Amendments agreed to in Convention as necessary to the proposed Constitution of Government for the United States, recommended to the consideration of the Constitution to be acted

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[20]Monroe Emanuel Deutsch, Documentary History of the USA (Washington: Department of State, 1905), IV, 525-6.

[21]Ibid., IV, 526, 528

> upon according to the mode prescribed in the fifth article thereof: Videlicet; That there be a Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable Rights of the People, in some such manner as the following: . . .[22]

There followed some twenty stipulations, the twentieth being as follows:

> That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others.[23]

This statement is readily recognized as coming from the Virginia Declaration of Rights of 1776 (cf. p. 32), lifted in its entirety therefrom by Colonel George Mason, who drafted the specifications accompanying the Virginia ratification of the new federal constitution.

A number of other states spoke in the same vein even to quoting the same reference from the Virginia Declaration. North Carolina listed it as one of ten requirements for ratification, and New York stated a similar stipulation as follows:

> That the People have an equal, natural and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience, and that no Religious sect or Society ought to be favored or established by Law in preference to others.[24]

Although Rhode Island was the most adamant in the matter of

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[22] Ibid., IV, 377.

[23] Ibid., II, 380.

[24] Ibid., IV, 191.

religious liberty, other colonies in New England held similar views. New Hampshire was very brief, but most explicit, "Congress shall make no laws touching Religion, or to infringe the rights of Conscience."[25]

Massachusetts was somewhat of an anomaly. Although certain portions of that colony struggled valiantly for religious freedom (cf. p. 27), the Massachusetts legislature, while proposing nine articles of amendments to the federal Constitution, omitted any having to do with religious freedom. Nor did she vote for the adoption of that particular amendment when the time came. This may have been due to the influence of the Plymouth Colony which was strongly Congregational. Also, this was in 1789, and the Congregational Church was not completely "disestablished" in Massachusetts until 1833 (cf. p. 30).

But Rhode Island was, by herself, quite capable of carrying the struggle for religious liberty in the Constitution on behalf of all of New England. She gave strong support to the Revolution, freely giving her men, money, strength, blood and loyalty for what she deemed to be a just cause. She supported and signed the Declaration of Independence; sent representatives to the first Continental Congress, and readily signed the Articles of Confederation of 1777.

But Rhode Island withdrew from the Congress when it moved to revise the Articles (and ended up by replacing them with the Constitution). It has been suggested that "ethically, legally,

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[25]Ibid., IV, 141.

morally and every other way (she) was justified in her stand".[26] The Articles provided a doctrine of religious liberty which satisfied Rhode Island. She feared, therefore, that such provision might be lost in any attempt to re-structure the document, and wanted no part of it. The Constitutional Convention avoided the question of establishment of a state church, the only reference to religion in the proposed Constitution being simply with respect to holding office (cf. p. 46). The last state to ratify, Rhode Island, finally did so on May 29, 1790, and only on condition that the first Congress meeting under the new Constitution made as its first order of business the drafting of amendments covering the items she listed as being essential to any unified government expecting the support of its constituent states. Among these conditions was the familiar statement first promulgated in the Virginia Declaration of Rights. (The new Congress had actually begun meeting in New York shortly after the ninth state had ratified the new Constitution in March, 1789; Rhode Island waited until it could see that the Congress "meant business" before it voted for ratification.)

THE NEED FOR A BILL OF RIGHTS

At the special meeting called by the Virginia Legislature for considering the ratification of the new Federal Constitution (June 12, 1788), Patrick Henry rose to protest the absence of any religious

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[26]Joseph Bondy, How Religious Liberty Was Written into the American Constitution (Syracuse: Oberlander Press, 1927), p. 25.

guarantee in the proposed document. James Madison's response to this revealed that he did not think any such safeguards necessary, since all reference to religion (other than the oath of office section) was intentionally omitted. In his thinking, the new government was to leave matters of faith and conscience strictly free of legislation. He argued:

> Is a bill of rights a security for religion? Would the bill of rights, in this state, exempt the people from paying for the support of one particular sect, if such sect were conclusively established by law? If there were a majority of such sect a bill of rights would be a poor protection for liberty. Happily for the states, they enjoy the utmost freedom of religion. This freedom arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society. For where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest. Fortunately for this commonwealth, a majority of the people are decidedly against any exclusive establishment--I believe it to be so in the other states. There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation . . . A particular state might concur in one religious project. But the United States abound in such a variety of sects, that it is a strong security against religious persecution, and it is sufficient to authorize a conclusion, that no one sect will ever be able to outnumber or depress the rest.[27]

Thomas Jefferson

Thomas Jefferson had written to James Madison late in 1787, expressing his views on the new Constitution. In his letter he said:

> I will now add what I do not like (about the Constitution as framed). First, the omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies . . .

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[27]James Madison, The Writings (New York: Putnam, 1904), V, 176.

> a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse, or rest on inference.[28]

This is evidence that Madison was aware of Jefferson's views on the question at the time he opposed Patrick Henry in the Virginia ratifying convention. And though he apparently never quarreled with Jefferson over the matter, he did aver at various times that such alterations to the constitution were unnecessary.

While acknowledging that a number of the supporters of the proposed constitution desired additional assurance for the protection of public liberty and rights of the individual citizen, Madison believed there were many who thought as he did that such additions were unnecessary. Yet, despite this, he was quite willing to support such alterations provided they could be stated so as not to suggest powers not meant to be included.

His reasons for feeling the additions were unnecessary included his belief that the rights in question were reserved by the way in which the federal powers are stipulated, and that perhaps an adequate flexibility with respect to such rights could not be obtained simply by a positive declaration of the same. He felt also that the limited powers of the federal government, plus the independent spirit of the states, afforded ample security from any infringement of rights. Yet he seemed to feel also that any bill of rights is ineffective just when control is most needed, namely, when the majority becomes too over-

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[28]Butts, op. cit., pp. 72, 73.

bearing. The danger of oppression is to be found in the real power in the government, which, for him, is the majority of the community. Restrictions on paper would prove ineffectual in the face of the public will to the contrary.

James Madison

All this notwithstanding, Madison admitted that a bill of rights in the constitution, or added to it, might serve a good purpose. For one thing, he felt that political truths so solemnly stated would eventually acquire the character of a fundamental tenet of free government and, thus incorporated into national sentiment, would counteract any effort to deny them. He allowed also that there might be instances of evil springing from usurped acts of the government, in the face of which a bill of rights would provide good ground for appeal to the people as the means of counteracting such evil. It would do no harm to guard against the possible danger of some future leaders attempting to erect an independent government by subverting liberty.

In addition to Madison, the Constitutional Convention numbered amongst its dignitaries, George Washington (who chaired the convention), Alexander Hamilton, Joseph Spencer, George Mason and ? (Patrick Henry.) Thomas Jefferson was in France representing the new United States. Hamilton seemed to share Madison's general aversion to amending the constitution, being of the opinion that the Constitution was, in effect, a Bill of Rights. True, though it did not contain the enumeration of such rights, this was unnecessary, because it gave all the rights necessary for a federal government and its respective

states. Since the people retained all the powers and privileges not specifically assumed by the federal government, no specific reservations were needed. Said Hamilton:

> This is a better recognition of popular rights, than volumes of those aphorisms, which made the principal figure in several of our State Bills of Rights, and which would sound much better in a treatise of ethics, than in a Constitution of Government.[29]

However, the feeling amongst many of the states that their liberties were not sufficiently secured by the new constitution was not at all assuaged by Hamilton's nor Madison's sophistry. Many of the delegates expressed the opinion that the constitution was not specific enough concerning matters of religious liberty, security of property, freedom of speech and the press, and other rights generally relating to the individual citizen. In short, the people did not feel at all secure in their "inalienable rights" to life, liberty and the pursuit of happiness, which depended so much upon complete freedom of conscience, without written guarantees that such would be protected from any usurpation by the new government. For people were, and should be for all time, equal before the law, regardless of their particular religious belief, or lack of any, for that matter, since questions of religious belief and practice are between each person and his God.

Thomas Jefferson, writing from France, voiced similar concern. He insisted that there are certain rights which cannot be surrendered: rights of thinking, speaking, writing; the right to be free in one's

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[29]David Kemper Watson, The Constitution of the United States (Chicago: Callaghan, 1910), II, 1354-1355.

person; the right to own property and engage freely in commerce. Responding to Madison's objections, he expressed the thought that "in a constitutive act which leaves some precious articles unnoticed, and raises implications against others, a declaration of rights becomes necessary, by way of supplement."[30]

He also felt that the various states need principles by which to evaluate the performance of the central government. The declaration of rights would furnish the guidelines for such evaluation of all acts of the federal government, and conversely, the federal government could accurately measure any opposition of the states thereby.

George Washington

George Washington, as did Hamilton, felt that the Constitution itself in no way threatened the religious beliefs or practices of any particular group and therefore no additional safeguards were particularly necessary. He reiterated this confidence in the Constitution when he responded to the United Baptist Churches in Virginia following his election to be the first President of the United States. He assured the Baptists that he never would have signed that document had he had the slightest apprehension of its encroachment upon religious liberty.

In view of the protests of many of the state legislatures in ratifying the Constitution, however, Washington recognized the

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[30]Jefferson, op. cit., III, 4.

necessity and validity of additional, specific, safeguards for freedom of conscience. He allayed the fears of the Baptists by telling them that no one would be more zealous than he in supporting any and all barriers against what he called the "horrors of spiritual tyranny" and all religious persecution.

George Mason

Colonel George Mason of Virginia insisted upon the need for a bill of rights and had urged this on the floor of the Constitutional Convention. His insistence upon such guarantees, as the price of Virginia's ratification of the Constitution, persuaded a conciliation on the part of James Madison and, ultimately, the inclusion of the first ten amendments to that document.

Mason was, in effect, supporting Patrick Henry's plea for satisfying the people of the protection of their liberties. Henry, feeling that a high percentage of the people opposed constitutional ratification, placed before the (Virginia) ratifying convention a resolution asking that a declaration of rights and other amendments be referred to the other states in the union that they might consider them before giving their ratification. He tried to persuade the Virginia legislature to insist upon amendments being included previous to that state's ratification, and hoped to gain a like support from other states.

Henry's resistance and determination, supported by Mason, persuaded Madison to propose something of a middle approach to the problem. He promised that the amendments which Henry favored and which

seemed reasonable he would recommend to the federal convention for subsequent adoption. Madison would not consent to "previous amendments", because he was most zealous for the adoption of the new Constitution by the various states and thought that any attempt to change it prior to ratification would endanger the survival of the union.

Apparently Madison's record on behalf of the people's "unalienable rights" was strong enough to win over the delegates at the Virginia ratification convention, and other states followed suit, until the required three-fourths of the legislatures concurred, with the eleventh ratification soon to follow. It was a victory for Madison, and once it was achieved he applied his efforts and his legislative prestige to steering the desired amendments through the first meeting of the new Congress of the United States.

THE BIRTH OF THE BILL OF RIGHTS

As Madison reflected upon the events in the ratification of the Constitution he realized that the question of the ample and adequate protection of the rights of the people was of prime importance for the new Congress. In view of the ratification of eleven states and "a very great majority of the people of America", he decided that some basic amendments would be safe, and at the same time would satisfy the minds of opponents by providing additional safeguards to liberty. He developed a firm conviction that the Constitution ought to be revised, and that one of the first duties of the new Congress was to prepare and

recommend satisfactory provisions for the rights of conscience, freedom of speech and press, trial by jury, and other guarantees.

R. Freeman Butts has rightly observed that

> in the light of recent efforts to reinterpret what the First Amendment meant to the people of the country and to the members of the First Congress . . . it is important to follow carefully the course of the debates that surrounded the religious clauses of the First Amendment.[31]

The first Congress met under the new Constitution on March 3, 1789. Considerable organizational business took place, and there seemed to be a desire on the part of some delegates, largely the Federalists, to postpone, if not avoid, consideration of any amendments to the Constitution.

Madison Addresses the House

However, on June 8th Madison addressed the House of Representatives on the subject. He reminded the Assembly that it was no secret that a great number of their constituents were dissatisfied with the Constitution, even though it had been ratified by a goodly number of people. They were jealous of their liberty, and the Congress should not overlook this very prominent feeling, but should expressly declare these great rights of mankind secured under the Constitution. Two states, one of them being Rhode Island, had withheld ratification, and Madison recognized that the new nation would never have complete ratification of the Constitution until something was done to provide those securities for liberty which this part of the community required.

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[31]Butts, op. cit., p. 78.

Though he agreed that revisions should be made, he felt that the Congress should proceed with caution, saying: "for while we feel all these inducements to go into a revisal of the constitution, we must feel for the constitution itself, and make that revisal a moderate one."[32]

He did not want to "open a door" to reconsidering the whole structure of government, but he was willing to "open a door" for the purpose of incorporating within the constitution provisions for the security of the rights of citizens. He genuinely believed that the great mass of the people who opposed the Constitution did so because it did not contain effective provisions for the protection of such particular rights. The simple answer to the problem, therefore, was to make such an inclusion, thus satisfying the public mind without in any way endangering or weakening the Constitution.

From the proceedings it was evident that Madison had in mind the amending, or changing, of parts of the Constitution itself, rather than appending a list of additional items as "amendments". His first recommendation was that a prefix be added to the document consisting of a declaration to the effect that all power resides in and is derived from the people. From that point on he suggested deletions and additions to specific articles and sections of the Constitution.

The fourth of these had to do with what later became the Bill of Rights. His specific recommendation was as follows:

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[32] Madison, The Writings, V, 375.

> That in article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.[33]

There followed statements concerning the right to speak, write, or print as inviolable, being one of the "great bulwarks of liberty", together with other matters pertaining to peaceable assembly, petitioning the government for redress, keeping and bearing arms, to mention a few.

He felt that, were these principles to be incorporated into the Constitution, the courts, in subsequent years, would consider themselves as guardians of those rights. Furthermore, they would "be an impenetrable bulwark against every assumption of power in the legislative or executive".

From his speech to the House it is also evident that Madison intended a degree of restriction upon the individual states with respect to "rights of conscience". He proposed an amendment to Article I, Section 10 (which placed certain limitations upon the powers of the states), prohibiting the states from violating the equal rights of conscience, freedom of the press and trial by jury in criminal cases.

This concern of Madison not only reflects his background of the struggle in Virginia (and his Remonstrance which was so effective in that struggle), but also reveals his continuing conviction that if the

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[33] Ibid., V, 377.

rights of all the people were to be protected, then not only the national government but also the respective state governments must be prohibited from interfering with their religious liberty. It is important to keep this in mind when attempting to analyze and evaluate the intention of the leaders of the first government with respect to the Bill of Rights.

The debates in Congress reflect the broad interest of Madison's attitude with respect to liberty and freedom of conscience. And though he was at first reluctant to amend the Constitution because he felt it sufficiently broad in its application and because he was afraid such "tampering" might risk unduly the effective implementation of the new government, once he was committed to it, he urged with the utmost of his capability the passage of broad sanctions providing protection for the people from both national and local governments.

The House of Representatives seemed to agree with Madison, and voted with him to restrict the states as well as Congress, providing thus for separation of church and state at all levels of government. As it turned out, however, the Senate could not be persuaded to include such broad coverage, and rejected the particular article in the House proposals that would have granted it.

Madison believed that there was more likelihood of abuse of powers by the state governments than by the federal, and that all laws which infringe the rights of the community are unconstitutional. He insisted that it was proper for every government to be stripped of any power to infringe upon the rights of conscience.

Debate Before the House

Having finely and effectively placed the problem of amendments before the House, Madison prepared for the debate that was to follow. It was broad and lengthy, and finally (on July 21) a special committee of one member from each state, Madison representing Virginia, eleven in all, was appointed. It was charged with studying the proposals and then reporting back to the House. This was done on July 28, and the report tabled. August 13 the House met as a Committee of the Whole to debate the proposals and the changes recommended by the report. Two days later the religious clause was debated. The committee had shortened it to read: ". . . no religion shall be established by law, nor shall the equal rights of conscience be infringed." This was expanded, following debate, into: "Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed."[34]

The Annals of Congress do not include the complete text of the debates, so that it is difficult to interpret the various nuances of political motives and issues involved therein. Madison revealed a political sagacity and dexterity which his youth belied. The Federalists, on the whole, felt that a bill of rights was a dangerous threat to the authority of the Constitution. There were still a few states where an established church existed and their representatives felt that there was nothing wrong with such a situation. There were

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[34]Documentary History of the Constitution (Washington: Department of State, 1905), V, 194.

the strong advocates of states' rights who felt threatened by the possibility of a too powerful central government. His task was to successfully bring about a resolution of the differences inherent in the three areas of interest.

Butts summarizes the various objections to the religion clause quite well.[35] Peter Sylvester (New York) feared it might have a tendency to abolish religion entirely. Benjamin Huntington (Connecticut) was afraid it would aid those who professed no religion at all, thus jeopardizing the place of religion in the lives of the people.

Elbridge Gerry (Massachusetts) proposed that the clause should read "no religious doctrine shall be established by law". Roger Sherman (Connecticut) thought it unnecessary since the new Constitution gave no authority for making religious establishments.

Catholic Daniel Carroll (Maryland) favored the clause without change, feeling that it gave adequate protection from governmental interference in matters of religion. In response to this, Madison said that he felt the words meant that Congress should not establish a religion, enforcing its legal observance by law, nor force men to worship contrary to conscience.

At one point in the discussion, Madison felt it might help matters if the word "national" were reinstated (as it had been in his original proposal of June 8th). But this suggestion brought charges of

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[35]Butts, op. cit., p. 84.

being a nationalist who favored extreme power for the central government, thus overstepping the bounds of a limited national government. In the face of this Madison hastily withdrew the proposal.

Madison still hoped for the acceptance of his recommendations that the clause including the states in the prohibition be retained. On August 17 his proposed change in Section 10 of Article I was debated (no state shall infringe the equal rights of conscience. . .).

Thomas T. Tucker (South Carolina) moved that the entire clause be struck since Congress had no right to interfere with the states. Madison's reply to this is summarized in the Annals:

> Mr. Madison conceived this to be the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was necessary to provide against the other, and was satisfied that it would be equally grateful to the people.[36]

The House agreed to allow this to remain as one of the proposed amendments. Some of the states had recommended certain amendments and their delegates were disturbed to find that they had been omitted, making such comments as "having misplaced their confidence in the General Government". Nevertheless, they voted with the committee, and finally, on August 24th, the list was forwarded to the Senate for its study and approval. The list included seventeen amendments--none of which was to be incorporated into the Constitution

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[36]Annals of Congress (Washington: Gales & Seaton, 1834), II, 757-8.

but which were intended to constitute an addendum of amendments following the main body of the document.

The Senate Meets

The Senate considered the House amendments the following day. That body met in closed session, and no official records were kept of the proceedings, unfortunately. However, Senator William Maclay (Pennsylvania) kept a diary which gives us some information as to what transpired. Apparently someone tried to have the matter postponed until the next session of Congress, but this failed. Maclay indicated that Senators Ralph Izard, John Langdon and Robert Morris treated the amendments "contemptuously"; it was Izard (South Carolina) who moved for postponement. John Langdon (New Hampshire) seconded this, and Senator Morris (Pennsylvania) stood to speak angrily against any hasty approval of the amendments.

Senator Maclay evidently did not sympathize with any delay on considering the amendments. Izard's motion lost even though its backers tried to insist that some experience with the new Constitution might show any amendments to be unnecessary. This insistence evidently disgusted Senator Richard Henry Lee (Virginia), who considered it ridiculous to talk of the need for experience as a prerequisite for amending the constitution. Lee felt that he was obligated to fight for the amendments, and during the arguments over the amendments made a comment reminescent of Jefferson's answer to Madison in their correspondence. Said Lee, "If we cannot gain the whole loaf, we shall

at least have some bread."[37] After much sparring, the Senate finally agreed to consider the proposals and began discussing them on September 2, 1789.

Because they met in closed session, the senators were able to be more forthright and direct in their criticisms of the various proposed articles. They eliminated what they considered to be excessive wordiness, and combined some articles to reduce the total. Their suggested version for the religion article was made to read:

> Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of people peaceably to assemble, and petition the government for the redress of grievances.[38]

This was to be listed as the third article of amendments. The Senate combined the House article on trial by jury with other sections, and struck a death blow to one of Madison's prime objectives--that of extending the provisions of a Bill of Rights to the states by prohibiting the states from violating individual rights of freedom of conscience, religious liberty, and others.

Richard Henry Lee had been carrying the struggle in the Senate for those principles that Madison, and Patrick Henry from Virginia, felt were vital to a free nation and its people. Lee kept in touch with Henry during the skirmishes. He was disturbed about the Federalist leanings in the Senate, and feared a tendency toward a

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[37]Robert Allen Rutland, The Birth of the Bill of Rights (Chapel Hill: University of North Carolina Press, 1955), p. 211.

[38]Ibid., p. 212.

consolidated government. And though he recognized that the amendments provided for some valuable rights, he felt that the power to violate them still remained.

Joint Committee

The Senate sent its altered version of the amendments back to the House in middle September. On the 19th the House docketed the consideration of the Senate's proposals and realized that a special joint committee of the two bodies would be necessary for resolving disagreements. Madison proposed this, and the Senate agreed.

Madison of Virginia, Roger Sherman of Connecticut, and John Vining of Delaware were appointed by the House to the conference committee. The Senate appointed Oliver Ellsworth of Connecticut, Charles Carroll of Maryland, and William Paterson of New Jersey to the committee.

Apparently the House, led by Madison, was willing to accept all but two of the Senate's counter proposals. These two were the ones concerning which Madison felt the strongest--the matter of religious freedom and the question of trial by jury. He had been struggling for these since his inspired speech at the beginning of the Congress and he had no intentions of letting them be lost. (The third article of the Senate proposals completely omitted the word "establishment" from the text.)

The Bill Adopted

Following considerable discussion on the religious question,

the third article was changed to read:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the Government for a redress of grievances.[39]

On September 24th the House approved this final version which Madison worked out with the committee, and the following day the Senate, pressured by the House, concurred. Madison's tenacity had persevered to victory for the more liberal House and the fulfillment of his promise to the several states which had conditionally ratified the Constitution.

The Congress of the United States, in the House of Representatives, on Monday, August 24th, 1789, had prefaced its proposed amendments to the Constitution with the following resolution:

> RESOLVED, by the Senate and House of Representatives of the United States of America in Congress Assembled, two thirds of both Houses deeming it necessary, That the following Articles be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States, all or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes as part of the said Constitution - Viz.[40]

This resolution was endorsed by both the Senate and the House to accompany the articles of amendment which were sent to the states for ratification by their respective Legislatures. It was intended as an explanation of the manner in which Congress responded to the felt

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[39] Documentary History of the Constitution, IV, 322.

[40] Ibid., IV, 193.

need of the people for "further declaratory and restrictive clauses" whereby the confidence of the people in the government would be enhanced and increased.

THE RESPONSE IN RATIFICATION

It was more than two years after the amendments were sent to the states for ratification that the eleventh state supplied the required three-fourths to make the Bill of Rights a reality. It is to be remembered that the Congressional resolution permitted the Legislatures to adopt all, or only part, or none of the amendments. The list which Congress sent to the states included twelve articles. Only ten were adopted by sufficient of the states to become part of the Constitution. The first two articles received little or no support from the states. The first Article had to do with fixing the number of Representatives to Congress, and the second article would prohibit the members of Congress from voting to change their compensation until an election had intervened.

States Consider Ratification

The third article proposed became, therefore, the first article of the Bill of Rights. A few of the states moved to an early ratification. Both Pennsylvania and New Jersey omitted the second article, the former omitting also the first article. It was the middle of the year following the Congress' referral to the states that Rhode Island finally came around.

Rhode Island, it is to be remembered, was one of the colonies

which had deferred ratification of the Constitution until it was promised (by Madison) those safeguards to individual liberty which she considered absolutely essential and which the amendments later supplied. They had evidently hoped for even more than the amendments offered, for the Rhode Island convention narrowly voted, late in May, 1790, to consider ratification. Perhaps it had looked for the confirmation of Madison's effort to include the respective states in the prohibition of governments' violation of human rights, and was disappointed that the Senate disallowed the inclusion of such. But whatever the reason, the state convention voted for ratification of the amendments in June of that year.

It is interesting to note also, that in assenting to the amendments, Rhode Island listed the religion clause of the third amendment as "Congress shall make no Law respecting the Establishment of Religion. . ."[41] As the Congress sent it down, Article the Third used the article "an" rather than "the". It is interesting to conjecture as to why this change was made. Was it simply a slip of the convention's scribe? Or did it reflect Rhode Island's historic aversion to all suggestion of a state church? It is interesting also that some writers who have dealt with the question of the meaning of the religion clause of the First Amendment have made the same error, using "the" for "an". The question will be considered more at length in the following chapter of the present study.

It was over a year after Rhode Island's ratification of the

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[41] Ibid., V, 364.

amendments before another state took action to ratify. Vermont had been admitted to the Republic on March 7, 1791, and on November 3 of that year, ratified the amendments. With the addition of Vermont to the union, the number of ten ratifications required for the amendments was raised to eleven.

Virginia Delays Ratification

In view of her active history in the cause of religious freedom, it seems strange that Virginia was the eleventh state to ratify the liberty amendments. And this was not accomplished until December 15, 1791, well over two years following the action of Congress approving them for submission to the states. The reason is simple, however, Virginia's opposition was stated precisely by members of the Virginia Senate, as follows:

> The Amendment does not prohibit the rights of conscience from being violated or infringed; and although it does restrain Congress from passing laws establishing any National religion, they might, notwithstanding, levy taxes to any amount for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the general government, as to give it a decided advantage over the others, and in the process of time render it as powerful and dangerous as if it was established as the national religion of the country.[42]

But Virginia finally accepted that principle that at least "half a loaf" or "some bread" is far better than no bread at all. Quietly she ratified the amendments, becoming the eleventh state to do so, and making thereby the three-fourths majority required for passage.

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[42]Albert George Huegli (ed.), Church And State Under God (St. Louis: Concordia, 1964), p. 281.

Observations

The Constitution and the Bill of Rights represent a different but meaningful struggle for freedom in a new, young nation, and was the only avenue possible for the founding fathers as they sought to make good the independence they had won with blood and other personal sacrifice. None of the other thirteen states had the degree of guarantee for freedom of conscience which was Virginia's with her Declaration of Rights and her Act Establishing Religious Freedom, and the national government at that time did not deem it possible nor expedient to impose such conditions upon them. This was not to be until almost a century later, with the fighting of another war and the adoption of another amendment. But so far as the leadership of the country's founding fathers was concerned, it is clear that they cherished, fought for, and struggled to achieve religious liberty and freedom of conscience for all the people in all the land over which the new government would preside. The history of America, reaching far back into various historical antecedents, and through the colonial struggle against oppression of human rights, gives ample testimony to truth that the new nation which evolved therefrom could neither be conceived nor constructed without its Constitution as it was amplified and made more workable by the addition of the first ten amendments, the Bill of Rights.

Having attempted an analysis of the historical antecedents of the religion clause of the first amendment as an aid to understanding its meaning and intent, this study will now proceed to a more detailed

examination of the two basic concepts inherent in the amendment, namely, that of "establishment" and the "free exercise" of religion.

CHAPTER III

THE MEANING OF THE FIRST AMENDMENT

The preceding chapter describes the long and persistent struggle of the settlers of this land to insure the "life, liberty and pursuit of happiness" which led most of them here in the first place. It was no easy task, nor did it happen overnight. Virginia's struggle made it easier, perhaps, to carry like guarantees into the new government than perhaps would otherwise have been the case. Even this was due primarily to the fact that Virginia's leaders in the new Congress insisted that it be done. This included Thomas Jefferson who, though he was in France during the time when Congress struggled with the Bill of Rights and could not therefore contribute personally to the debate, joined the battle through the medium of his pen as he carried on an active correspondence with Madison on the matter.

While it is true that the religion clause of the First Amendment is not so detailed or explicit as Virginia's Act for Establishing Religious Freedom, it encapsulates the basic thrust or aims of that Act, and certainly sought the same objectives. Madison was sufficiently satisfied to accept it, realizing as he did that even though he was unable to carry all his desires through the Senate, he was able to secure those points which he deemed most essential. Jefferson likewise, though he would have preferred something closer to the Virginia Act in detail, was elated to learn of the passage of the Bill and its subsequent ratification by the requisite eleven states.

As indicated heretofore, it is generally conceded by most historians (though one Catholic writer takes exception to this; see p. 83) that Roger Williams and the Baptists were in the vanguard of the fight for religious freedom in this country, and could be considered the most extreme advocates of such. Some of their representatives informed Madison, after the passage of the Bill, that the amendments entirely satisfied the Baptists. The contemporary leader of the Virginia Baptists, John Lelend (who had written George Washington as the new President urging passage of a religious freedom amendment), observed, after its passage, that everyone could now speak without fear, and maintain the principles he believes, and worship as he wills either one god, three gods or no god or twenty gods, and know the government would protect him in doing so.

The Virginia Baptists already enjoyed this immunity in that state, and with the passage of the First Amendment they knew that they had nothing to fear from the central government's overriding the state's guarantee. Baptists in other states could not feel quite as secure because the scope of the amendment did not cover the individual states. It restricted the Federal government only, but even this was a long step forward, they realized, toward complete freedom of conscience.

The preceding chapter also makes evident the fact that were it not for the Bill of Rights, there would have been no Constitution. The states refused to ratify the proposed Constitution in sufficient numbers to assure its passage <u>until</u> they were promised that adequate

guarantees of individual liberty would be included by the Congress at its first meeting under the new Constitution. The Constitution and the Bill of Rights, therefore, are of one piece, "out of the same cloth" as it were. Madison was gratified that he had fulfilled his promises to the states. And, as one writer has suggested, the Constitution and the Bill of Rights "came to be regarded as a symbol of the American way of life, as an embodiment of the triumphant achievement of a self-governing and liberty-loving people".[1]

THE MEANING OF "ESTABLISHMENT"

Because the Bill of Rights is such an integral part of the Constitution, and in view of the fact that religious liberty is the first freedom guaranteed therein, it is essential that careful attention be given to the phraseology of the religion clause in the First Amendment.

Obviously, there are two essential parts to the clause, each bearing equal weight or importance. One has to do with " an establishment of religion" and the other with the "free exercise" of religion. Yet, it has become quite evident that, down through the years since the Bill took effect, there are considerable differences of opinion as to both the meaning and the intent of the two parts. This is particularly the case with the word "establishment". What does the word "establishment" mean? What did it mean to the leaders in

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[1]Edward Dumbauld, The Bill of Rights (Norman: University of Oklahoma Press, 1957), pp. 140-141.

government, the founding fathers, who used the word and incorporated it into the amendment?

The State Church

It is not an easy task to determine such meaning with any degree of authority. Unquestionable, in terms of the contemporary scene at the time of the struggle for independence, the word "establishment" identified the one church which enjoyed the privilege of governmental encouragement, protection and support. This was the case in Virginia prior to the revolution, in which the Church of England was the "establishment"--the state church. It was likewise the case in the Massachusetts Bay Colony, where the Congregational (Calvinistic) church enjoyed the status of being the officially recognized church.

The preceding chapter reveals that much of the struggle for religious liberty was directed at eliminating the state church, separating it from the state, or appreciably reducing its power, prestige and control in the colonies wherein they enjoyed such. The other half of the struggle was directed toward achieving equal rights of all religious groups freely to preach and practice their faith.

Jefferson, in his writings[2], reviewed the condition in Virginia prior to the passing of the Act for Establishing Religious Freedom. The first settlers in the country were from England, and of

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[2]Saul Kussiel Padover, The Complete Jefferson (New York: Duell, Sloan & Pearce, 1943), pp. 673-674.

the English Church. They assumed the powers of making, administering and executing the laws of the colony. Acts of the Virginia Assembly had made it penal for parents to refuse to have their children baptized, for example, and made it unlawful for Quakers to assemble (worship together), and made it a felony for any master of a vessel to bring Quakers into the colony, and even imprisoned many who were already in the colony, holding them until they would agree to leave the territory.

The Anglicans maintained this control for a full century after their arrival, but by the time of the revolution, fully two-thirds of the people had become dissenters. The Virginia convention which passed the Declaration of Rights in May of 1776 repealed all acts of Parliament which had made it a crime to maintain any particular opinions in matters of religion.

Thus did Jefferson describe establishment at its worst, and it had to go. He was joined in this conviction by others in his own colony, and by those of other colonies as well--establishment had to be dis-established.

And although there was also an established church in New England, it was not quite the same as that in Virginia. It existed. It was at first not questioned, until Roger Williams and others began to oppose it. But all the same, it was an "establishment", and (particularly in Plymouth Colony) assessments were levied to help support clergy in the townships.

Difficulties in Generalization

Some of the writers addressing the subject of the establishment clause, apparently indulge in a tendency toward generalization, and this serves only to "muddy the waters" of definition. Marnell[3], for example, suggests that "the very brevity of the religious clause of the First Amendment indicates how limited was the common denominator of agreement." This hardly seems plausible when it is remembered that in the main the House of Representatives agreed upon a relatively large Bill of Rights, even to the inclusion of Madison's desire for a prohibition upon the states similar to that imposed upon the nation. It was only in the Senate, where there were an appreciable number of Federalists, that the amendments ran into significant opposition.

In observing that "Congress could not establish a church; that the newly created nation was to have no national church", Marnell concluded, "beyond that the framers of the Constitution could not go, even if they had a mind to go farther." The framers did go further; they decreed that no laws would be passed (at the Federal level) which would "prohibit the free exercise" of religion. Also, they could have required the same prohibition on the several states, had not political expediency suggested a more "middle" ground. Such are only two examples of careless thinking on the part of some of those who would attempt an explanation of the religion clause of the First Amendment.

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[3]William H. Marnell, The First Amendment (Garden City: Doubleday, 1964), p. 113.

Clarity of the Clause

Some eminent constitutional scholars, including Cooley and Story, suggest that the clause is quite clear, and means exactly what it says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Yet, is it really as simple as that? Dumbauld[4] suggests some interesting variables which might be possible.

For example, commenting on the very first word in the amendment, he observes correctly that the prohibition is directed to Congress. But what about the President, for example? If he is not included in the prohibition could he do anything favoring an establishment of religion or affecting the free exercise of religion? President Truman raised a furor when he suggested that he would send an envoy to the Vatican in Rome. Does the religion clause in the First Amendment have anything to say about such action? (Currently, President Nixon has made a similar suggestion.)

As Dumbauld observes, however, he would have no such power if the Federal government, as a whole, is enjoined from interfering with religion. The reference to Congress is calculated to restrict the law-making body of the nation, and as part of the Federal government both the administrative and the judicial branches, as well as the legislative, come under the restrictions of the Constitution. The amendment contrasts the powers of the Congress with those of the

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[4]Dumbauld, op. cit., p. 103.

state governments; it is the Federal government, not the state governments, that is prevented from making any laws involving religion.

Another interesting observation is made by Dumbauld[5], this time in connection with the word respecting. Congress can make no law respecting . . . Technically, then, even a law prohibiting establishment would be impossible for Congress. He suggests that the recognition of states' rights may have suggested such a term, so that Congress would not be able to interfere with religion, for or against, in any state.

The fact that some of the states levied taxes for the support of religion or its ministers, might suggest that the use of the words respecting an establishment of religion did not preclude the federal government from doing this, nor from supporting or favoring a particular denomination or group, thus giving it an advantage (more freedom and latitude) over others. But this places too great a limitation upon the interpretation of the clause.

Brevity of the Clause

Delegates from Virginia contrasted the brevity of the clause with their state's Act for Establishing Religious Freedom, and felt that the federal version did not go nearly as far as theirs in granting religious liberty. For this reason they quite likely were unwilling to grant any expansion of interpretation of the religion clause in the amendment to cover such contingencies as mentioned above. Historical

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[5]Ibid., p. 104.

application of the amendment subsequent to its enactment has shown the federal government to be most careful in avoiding any action which would suggest aid to establishment of religion.

Mention has been made of the article in the Northwest Ordinance (cf. p. 30) referring to religion and government, and the fact noted that Madison was opposed to this and that after the adoption of the Constitution and the Bill of Rights such an indulgence was never repeated. Madison, when he was President, vetoed a proposal by Congress to set aside government land for religious uses, because of the establishment clause in the First Amendment. The Supreme Court, in numerous "interpretations" through the years, has found the clause to be most restrictive.

Roman Catholic Viewpoint

As a help to achieving perspective with respect to the establishment clause it may be useful to consider the Roman Catholic viewpoint. Two Catholic writers have some interesting views on the question. Both happen to be Jesuit scholars, and appear to be quite perceptive. However, they do write from a particular, and obvious bias.

Wilfred Parsons summarizes his interpretation as follows:

> 1. The thought of Congress, after debating and changing Madison's first version of the Amendments, crystallized around two basic ideas: The national government should adopt no religion as the official one of the United States, and it should respect the freedom of the exercise of any religion.
> 2. Nothing was done about what the individual States might do in this regard and it was understood that each State retained the right of establishing the religion of its choice, or of

supporting any and all religions, as many of them did for many years thereafter.

3. Nothing was said or implied in the legislative process to the effect that the religious amendment to the Constitution forbade the Federal Government to maintain relations with various forms of religion, or even support them, provided it acted with equality and impartiality.

4. The so-called "American principle of separation of church and state" simply did not exist at the time of the adoption of the First Amendment, while the policy of co-operation of the state with religion was universal.

5. The ruling motive behind the adoption of the First Amendment was partly political--the Constitution would not have been ratified unless it was understood that the Federal Government would not interfere with local arrangements about religion; and partly legal--the national state that was being set up (whatever the individual states might do), was granted no competence of deciding in matters of religion as such.

6. The final solution arrived at by the Congress was that the Federal Government should respect equality among competing religious denominations, and also the right of each individual so far as the Federal Government was concerned, to belong to the denomination of his choice.[6]

Father John Murray also has a rather unique interpretation of the religion clause of the amendment. Prefacing his major thesis with a complete rejection of the part played by Roger Williams in the fight for religious liberty (claiming that he was a seventeenth-century Calvinist who somehow got hold of certain remarkably un-Calvinistic ideas on the nature of the political order; his ideas whatever their worth, had no genetic influence on the First Amendment), he suggests that:

> From the standpoint both of history and of contemporary social reality the only tenable position is that the first two articles of the First Amendment are not articles of faith but articles of peace. . . . They are not true dogma but only good

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[6]Wilfred Parsons, The First Freedom (New York: McMullen, 1948), pp. 48-49.

> law. . . it is the only view that a citizen with both historical sense and and common sense can take. . . these clauses were the twin children of social necessity, the necessity of creating a social environment, protected by law, in which men of differing religious faiths might live together in peace. . . . This legal criterion is the first and most solid ground on which the validity of the First Amendment rests. . . . Church and state came into being under the pressure of their necessity for public peace.[7]

Murray goes on to say that four leading factors contributed to this necessity: "1) the great mass of the unchurched, 2) the multiplicity of denominations, 3) the economic problems attendant upon persecution and discrimination, and 4) the pressure of a widening of religious freedom in England."[8]

Father Murray concludes that:

> In American circumstances the conscience of the community, aware of its moral obligations to the peace of the community, and speaking therefore as the voice of God, does not give government any mandate, does not impose upon it any duty, and does not even communicate to it the right to repress religious opinions or practices, even though they are erroneous and false. . . . On these grounds . . . the Catholic conscience has always consented to the religion clauses of the Constitution. . . . Consent given to the law is given on grounds of moral principle. . . . Above all else the early Americans wanted political freedom. . . . Made autonomous in its own sphere, government was denied all competence in the field of religion. . . . The American thesis is that government is not juridically omnipotent.[9]

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[7]John Courtney Murray, We Hold These Truths (New York: Sheed & Ward, 1960), p. 59.

[8]Ibid., p. 60.

[9]Ibid., p. 65-68.

> The American Catholic takes the highest ground available in this matter of the relations between religion and the government when he asserts that his commitment to the religion clauses of the Constitution is a moral commitment to them as articles of peace in a pluralistic society.[10]

Observations on Catholic Viewpoint

Some observations on the foregoing are in order. Parsons's statement of the first of "two basic ideas" reflects the limitation characteristic of some interpreters who feel that the religion clause simply forbids the government from setting up a national religion (item 1). However, it is amply evident from the attitude of the framers of the Constitution that the clause covers more than this. It was intended to keep the national government from interfering in any way with the religious posture of the respective states. It was also intended to safeguard any and all religious groups from any threat of any kind from the central government.

His assumption concerning the "support of various forms of religion by the Federal Government" (item 3) is also open to question. True, nothing is "said" about this in the clause in question, but that the implication is there, forbidding such "support", was borne out by the attitude and subsequent decisions of the early leaders of the new government. Both Madison and Jefferson, as well as others, felt this very strongly.

His observation concerning the "separation of church and state principle" (item 4), though perhaps technically correct, is inaccurate.

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[10] Ibid., p. 78

"Separation" had definitely been accomplished in Virginia with the Act for Establishing Religious Freedom, and the major objective (though not the only one) of the religion clause was to guarantee that church and (national) state would indeed be separate. And though it is quite true that the amendment does not "state" the principle precisely, it was there all the same, as Jefferson spelled it out seven years later in a letter to a group of Baptists. Surely it cannot be assumed that this was a "new" thought of Jefferson's when he wrote the letter. His attitudes concerning church establishments and the state were with him long before the advent of the Constitution and the Bill of Rights, and furthermore, continued with him to the day he died.

Nor was "cooperation of the state with religion" (if he means by religion the church) at all "universal". In the days before the revolution, some colonies cooperated with some churches (or religious groups), but were quite antagonistic toward others. Furthermore, the attitudes and actions varied from colony to colony.

The question of government interfering "with local arrangements about religion" (item 5) does not seem quite accurate either. While it is true that some of the Federalists represented states in which there already existed state-supported churches (and they did not want the central government tampering with this), the primary concern for a statement guaranteeing the rights of conscience came from various groups of citizens who simply did not want the central government to be a threat to their religious beliefs and practices. In the states where they were still carrying the battle for complete freedom they

could continue the struggle, provided they were not hampered by the threat of a higher government (as, for example, in Massachusetts, where complete separation did not come until 1833).

Parsons's statement concerning "equality among competing denominations" and the "right of each individual to belong to the denomination of his choice" is incomplete. It doubtless reflects the thought of some writers (non-Catholic as well as Catholic) that the struggle for religious liberty was strictly a struggle between Protestant denominations. It is understandable as providing the Roman Catholic "denomination" with footing equal to Protestant "denominations" before the law. But it in no way reflects the broader scope of the provision which allows non-believers, and those who have no connection whatsoever with "denominations" of any sort, to have the right to so express their conscience and enjoy freedom from intervention by the national government in doing so.

Murray's assumptions and conclusions are interesting, but also evoke serious question. Perhaps he is suggesting a "philosophy" of the First Amendment, but whatever his intent, it would seem that the religion clause is intended to be something more than merely "articles of peace". True, they are not "articles of faith", and the statement embodied in the clause is not a theological statement, nor is any theological basis suggested by the words. But in the minds of the framers of the Bill of Rights, the intent of these was something far greater than simply "keeping the peace". It must be kept in mind that the primary objective of the Bill of Rights was to guarantee personal

liberty in many areas of life, and that the religion clause was designed to assure liberty of conscience as expressed by one's freedom to follow his religious convictions and beliefs.

Similar observations can be made concerning the list of "four leading factors". In the main the religious struggle was not waged by the "unchurched", and while it is true that there was a variety of denominations and religious persuasions, economic pressures could hardly be given as a reason for the struggle, any more than could "religious freedom in England". The "necessity" to which the amendment addressed itself was that of guaranteeing freedom unhampered by governmental interference; "public peace" was simply to be the "fruits" of "liberty for all".

A similar argument can be made against the suggestion that "political freedom" was the object of the religion clause. "Above all else" the early settlers of this land wanted personal freedom--freedom to live, freedom to worship (or not to worship, for that matter), freedom to believe what one wanted to believe. That such freedom had to be obtained politically, and was so secured, was incidental to the desires of the people.

All of which suggests that, according to Murray, adherence to the religion clauses of the Constitution is a matter of expediency for the Roman Catholic. He suggests that the Catholic, being a citizen of this country, is morally obligated to grant religious freedom to others since he likewise enjoys the same benefits. He is legally obligated also, since all citizens of the land are required to support the

Constitution, in all of its parts. There is no acknowledgement of the fundamental truth implicit in the religion clause, namely, that every human being has the right, under God, to believe as he wants to believe, and to practice his belief as he feels persuaded by conscience so to do (provided only that it not conflict with the moral structure of society nor endanger the peace and well-being of the community).

The viewpoints of the two foregoing writers serve to remind any who take seriously the implications of the First Amendment that the fundamental intent and purpose of the amendment must always be borne in mind, unclouded by extraneous postulates. Only by adhering to the concept of freedom of conscience and its need for expression in religious liberty can an adequate understanding of the religion clause of the First Amendment be approached.

Problem of "an" and "the" in the Clause

Perhaps at this point it may be helpful to examine the apparent confusion over one short word in the religion clause. The first sentence of Article I of the Bill of Rights reads, in part: "Congress shall make no law respecting an establishment of religion, . . ." Some scholars have been very imprecise in quoting this sentence from the Constitution.

No less an authority on church and state in this country than Stokes quotes the clause with a change in the article, thus: ". . . the other against any law respecting the establishment of re-

ligion, . . ."[11]

Wilson makes the identical error when he writes: "Nevertheless the neutral clauses of the First Amendment, 'Congress shall make no law respecting the establishment of religion, . . .'"[12]

Reference has already been made to the same error being committed by the Rhode Island legislature (cf. p. 71). One cannot help wondering why such errors were made. Possibly the members of the Rhode Island assembly were so engrossed in the fear that the new national government might be led into setting up a national religion which would then supersede the complete freedom of religion enjoyed in Rhode Island, that the clerk of the assembly thought only in such specific terms, and thus used the article "the" instead of "an".

But what of the two writers mentioned above (and others as well) who have made the same error? How could such a thoughtful historian as Stokes, whose three volume work is perhaps the basic authority on Church and State in the United States, have made such a mistake? It is a difficult question, and may suggest that in the subconscious thought of the writers the idea of no national church being established by the government was not only primary but perhaps exclusive. It is quite possible that anyone concentrating on a simple, direct, unmodified interpretation of the "establishment" clause as being the answer to the "church and state" question would tend to

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[11]Anson Phelps Stokes, Church and State in the United States (New York: Harper & Bros., 1960), I, 484.

[12]John F. Wilson, Church and State in American History (Boston: Heath, 1965), p. 53.

forget or ignore the possibility of anything being admitted to complicate that view.

Apropos of the question raised by these changes in wording are further questions raised by one of the writers in the field. He asks:

> Is the meaning any different from what it would have been if the provision had read "respecting establishment of religion" or "respecting the establishment of religion"? Does "establishment" refer only to a concrete institution, not a process of governmental action?[13]

It is the present writer's opinion that a variety of interpretations might well follow from an inquiry into the contextual implications of the particular article used in the clause, namely, "an establishment of religion". These implications will be considered in the concluding chapter.

It is interesting to notice also that when James Madison was president and was called upon to decide the propriety of specific legislation related to religious groups, he re-phrased the establishment clause in a somewhat distinctive manner. But before considering this, we shall examine Madison's thinking and general posture toward the question of establishment.

Madison's Viewpoint

In writing his famous Remonstrance while serving in the legislature in his own state of Virginia, Madison "picked up the gauntlet", as it were, in the battle against "established religion" within the state. He initiated a pattern of legislative activity which

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[13]Dumbauld, op. cit., p. 106.

followed him into the first Congress of the United States, through the process that hammered out the Constitution and on into the monumental struggle which produced the Bill of Rights.

Throughout this process it is evident that Madison broadened his concept of the problem of religious liberty and the part that the state should have in this. He first tackled this significantly when he proposed the addition to the Constitution in his opening speech to the new Congress. Although this has already been included in the previous chapter, it is given here again to place it in its proper perspective:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.[14]

It seems evident that his use of this formula concerning equal rights of conscience, coupled with the rejection of <u>any</u> national religion, was spelled out with the intention of blocking all forms of single or multiple establishment, and preventing the government from becoming involved with any particular church, or with all churches. We should note the similarity between his Remonstrance and the speech in Congress on June 8, 1789, and recall that he believed the states as well as the federal government should be so restrained. Through that entire speech before Congress, Madison's references to liberty of conscience, freedom of speech and press, and trial by jury were often repeated. He feared the suppressive weight of the majority of the people over against the

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[14]<u>Cf. supra</u>, p. 61.

minority, operating in all areas of the community, that is, the individual state. No majority of belief should have the right to abridge the rights of others with respect to conscience.

In the process of Congressional debate, Madison's recommendation on religion was extensively simplified: ". . . no religion shall be established by law, nor shall the equal rights of conscience be infringed."[15] This shortened version still included his equal rights of conscience concept, however. In the ensuing debate Madison suggested that the word national be reinstated to avoid any misunderstanding, but when others thought that this would sound too much like a reference to a super-government, he dropped it.

After being debated through the Senate, the version recommended by that body came out as follows: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion . . ."[16]

When this went back to the House and was then given to a special joint committee of Senators and Representatives for further study, the wording of the article was changed to read, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."[17]

As can be seen from this wording, Madison's "equal rights of conscience" was omitted. This was a concession on the part of

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[15] Cf. supra, p. 63.

[16] Cf. supra, p. 67.

[17] Cf. supra, p. 69.

Madison to the group process which enabled the religion clause to be adopted. Yet, the wording does reflect the thought that religion (meaning the church) and the state should be separate, a concept which had already triumphed in Virginia and was being increasingly considered in other states as well. The following summary of Butts states it quite well:

> The First Amendment did, however, commit the federal government to the principle of separation as it was being defined in the majority of the states. This meant not only free exercise of religious worship based upon civil rights of conscience but also the prohibition of "co-operation" by the federal government with one or with many churches. "Co-operation" of church and state is just as inimical to the equal rights of conscience as free exercise is necessary to them. The generic term "religious freedom" requires "no establishment" as fully as it requires "free exercise". A violation of either is an attack upon religious freedom.[18]

With this background of Madison's thinking, consider then his implementation of separation during his presidency. The House of Representatives, in February, 1811, proposed a bill to incorporate the Protestant Episcopal Church in Alexandria, then a part of the District of Columbia. Madison vetoed the bill, giving the following reason for doing so:

> Because the bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious functions, and violates in particular the article of the Constitution of the United States which declares that "Congress shall make no law respecting a religious establishment".[19]

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[18]R. Freeman Butts, The American Tradition in Religion and Education (Boston: Beacon Press, 1950), p. 91.

[19]Saul Kussiel Padover, The Complete Madison (New York: Harper & Bros., 1953), p. 307.

In the same month and year the House proposed another bill, this time for the relief of certain named individuals and the Baptist Church at Salem Meeting House, in the Mississippi Territory. Again Madison vetoed this bill, as he had vetoed the other, giving essentially the same reason for doing so:

> Because the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that "Congress shall make no law respecting a religious establishment".[20]

Now here again, the same question can be raised as to why Madison reversed the phrasing of the religion clause, changing the article as well as the order of words, as was previously raised concerning the phrasing of other writers on the subject. But here, it would seem, there is a significant difference. Madison, in rephrasing the clause, in no way changed its meaning. The articles a and an are both indefinite, relating to no particular religious establishment, and at the same time relating to any and all religious establishments. His particular way of phrasing the concept, in these and other similar instances, serves to emphasize all the more, the broad view which he held of the meaning of the clause and its application. Also his manner of stating it makes the application more specific as to the religious group in question at the time, and especially as to the unequivocal meaning of the clause, so far as Madison was concerned. And as stated previously (pp. 91-92) the implications of this, and

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[20] Ibid., p. 108.

other ways of stating the clause, leave room for considerable question.

Madison had hoped to get a more specific statement (as in the one he proposed in his speech to Congress), reflecting as nearly as possible the complete detachment of church from state as in Virginia. He must have considered the statement as finally proposed by the joint committee as being sufficiently close to his ideas to permit a broad application, thus covering the entire concept as he viewed it. He reflected Jefferson's views in this.

Jefferson's Viewpoint

Thomas Jefferson was the person who articulated most succinctly the views of the founding fathers concerning the First Amendment and the concept of complete separation between the state and the churches. It was not until ten years had passed following the ratification of the Bill of Rights that he stated most specifically his views on the question. This was done in what is now a well-known letter which he wrote on January 1, 1802, to a Committee of the Danbury Baptist Association in Connecticut. It is so crucial to the question of the meaning and intent of the First Amendment that it is quoted here in full:

> Gentlemen: The affectionate sentiments of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist Association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing.
>
> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers

> of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof", thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.
>
> I reciprocate your kind prayers for the protection and blessings of the common Father and Creator of man, and tender you yourselves and your religious association, assurances of my high respect and esteem.[21]

The key words in the letter, of course, are "thus building a wall of separation between church and State". It was a phrase that caught on, and reflected not only his own view but Madison's and others' as well. It was taken up subsequently by the Supreme Court as it endeavored to interpret the meaning of the First Amendment in the light of contemporary questions and problems which have come before it. It is today the popular, accepted phrase for describing, "in a nutshell", the meaning of "no law respecting an establishment" and "nor prohibiting free exercise". It summarizes nicely the meaning of the religion clause, although there are some, even many, who question the validity of this assumption.

Yet, questioning of this notwithstanding, Jefferson acted at all times during his tenure as president in faithful adherence to this conviction. For him "respecting an establishment of religion" meant, for the government and its representatives, <u>having nothing to do with</u>

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[21]Padover, <u>The Complete Jefferson</u>, pp. 518-19.

any religious establishment (group, organization, denomination, etc.). One or two examples will serve to illustrate this.

In a letter to the Rev. Samuel Miller, a Presbyterian clergyman who had asked him to appoint a national fast day as his predecessor had done, he replied:

> I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made restricting the establishment or free exercise of religion; but that also which reserves to the States the powers not delegated to the United States. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. . . . I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines; nor of the religious societies that the general government should be invested with the power of effecting any uniformity of time or manner among them. . . Civil powers alone have been given to the president of the United States, and no authority to direct the religious exercises of his constituents.[22]

It should be noted that in this very cryptic letter, Jefferson used almost the very same phrase which Madison used when he made his reply to Patrick Henry in the Virginia Legislature concerning government intermeddling with religion.[23] They both felt very keenly that no government should have any right whatever to interfere with the workings of religious groups or bodies, i.e., churches, or church establishments.

It should also be noted that both Madison and Jefferson, when exercising their office as president, spoke of the government and

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[22]Thomas Jefferson, The Writings (Washington: Taylor and Maury, 1853), VI, 353.

[23]Cf. supra, p. 52.

general government as having no jurisdiction over religion. They did not say that Congress alone had no jurisdiction.

> If no branch of the national government has any inherent or delegated power under the Constitution to intermeddle with religion, the fact that the First Amendment expressed a restraint only upon Congressional action may not be construed as an implied grant of power to the President or the judiciary.[24]

Supreme Court Attitude

Concerning the meaning of establishment, it remains only to examine the attitude and decision of the Supreme Court to complete the picture. In 1964 the Legislative Reference Service of the Library of Congress prepared and published a second edition (the first being published in 1952) of an Analysis and Interpretation of the Constitution. With respect to the religion clause of the First Amendment, the work gives an excellent summary of the decisions on the part of the Supreme Court which have contributed to the assumption of its present general attitude and posture on establishment.

One of the key statements of the Court with respect to the "wall of separation" doctrine was made by Justice Black (voting with the majority) when a divided court (five to four) sustained the right of local authorities in New Jersey to provide bus transportation for children attending parochial schools. Apparently with the approval of the Court, his words of warning were thus stated:

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[24]Leo Pfeffer, Church, State and Freedom (Boston: Beacon Press, 1953), p. 116.

> The "establishment clause" of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church-attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activity or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[25]

Because of the sharp division in the court in this very pivotal decision, the views of a most articulate and cogent dissenting Justice should also be reviewed. Justice Jackson stated the essence of the question in these terms:

> Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination? . . . the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. . . . Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself. . . . The State cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church. . . . The Court, however, compares this to other subsidies and loans to individuals. . . . Of course, the state may pay out tax-raised funds to relieve pauperism, but it may not under our Constitution do so to reward piety. It may spend funds to secure old age against want, but it may not spend funds to secure religion against skepticism. It may compensate individuals for loss of employment, but it cannot compensate them for adherence to a creed. . . . the basic fallacy in the Court's reasoning which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected.[26]

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[25]Constitution of the United States of America (Washington: Government Printing Office, 1964), p. 848.

[26]Dumbauld, op. cit., pp. 107-08.

In the above dissenting opinion the Justice touches upon a rather crucial aspect of the Supreme Court's methodology, namely, its failure to follow consistently from case to case its rationalizations of the meaning of the religion clause in the First Amendment. This will be discussed more specifically in the concluding chapter. One writer has observed that "Justice Jackson was noted for his belief that cases should be decided on their facts rather than to promote a policy".[27]

Apropos of the foregoing discussion of the meaning of establishment as seen through the eyes of the founding fathers and interpreted by the Supreme Court of the land, Huegli observes that:

> Respected constitutional students and writers almost uniformly have assumed, as self-evident truth derived from a reading of the First Amendment and a study of the circumstances surrounding its adoption, that the total effect of the establishment clause is solely to prohibit preferential treatment of any religious group or sect. Such prohibition would of course encompass the establishment or recognition of a national church and, by virtue of the Fourteenth Amendment, the establishment of a state church.[28]

Fundamentally, this is an accurate summation, and reaches the point of discrimination held by Madison and Jefferson with respect to an establishment of religion; i.e., government shall not "intermeddle with religion" in any way, shape or form. It would seem that students of the constitution generally take this attitude, whereas the Supreme Court has tended to be even more restrictive than this in its interpretation of the meaning of the clause.

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[27] Ibid., footnote, p. 107.

[28] Albert George Huegli, (ed.), Church and State Under God (St. Louis: Concordia, 1964), p. 217.

THE MEANING OF "FREE EXERCISE"

As one reads the religion clause of the First Amendment there seems to be little question about the concluding phrase of the clause. Establishment has given rise to much misunderstanding and resultant controversy. Free exercise sounds simple enough. What more can it mean than that everyone is entitled to practice his religious beliefs in the manner which his conscience dictates and to which he is accustomed? This is freedom of conscience--the right to be free in what one believes and in what he practices--just so long as he grants others the same privilege.

But here again, the history of the interpretation and implementation of this half of the religion clause has likewise given rise to misunderstanding and misinterpretation, as well as controversy. What does the phrase--the free exercise thereof--mean?.

In his second inaugural address Thomas Jefferson said:

> In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of state or church authorities acknowledged by the several religious societies.[29]

Jefferson, Madison and Washington

Jefferson and Madison both attempted a strict interpretation of the phrase, and demurred from making formal pronouncements that

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[29]Padover, The Complete Jefferson, p. 422.

included any reference of a religious nature. And this was not because they personally eschewed a religious concern nor refused to recognize the place that religion had in the development of the nation. It was because they felt religion, in whatever expression it may take, was a matter of individual conscience, not to be dictated to, nor even suggested, by the government, either by fiat or by statements (proclamations) of its official spokesmen. Jefferson even refused to issue the annual Thanksgiving proclamation which, by the time he had become president, was a well-established tradition, first enacted officially under the republic by George Washington during his presidency.

George Washington, it may be noted here, as first President of the United States, was most concerned about, and supportive of, free exercise. During the year when the struggle for a Bill of Rights ensued in Congress, he wrote to the Religious Society called Quakers as follows:

> Government being, among other purposes, instituted to protect the persons and consciences of men from oppression, it certainly is the duty of rulers, not only to abstain from it themselves, but, according to their stations, to prevent it in others.
>
> The liberty enjoyed by the people of these States, of worshipping Almighty God agreeably to their consciences, is not only among the choicest of their blessings but also of their rights. While men perform their social duties faithfully, they do all that society or the state can with propriety demand or expect, and remain responsible only to their Maker for the religion, or modes of faith, which they prefer or profess.[30]

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[30]Edward Frank Humphrey, (ed.), Liberty Documents (New York: National Conference of Christian and Jews, 1936), p. 17.

At about the same time he wrote in similar vein to the Hebrew Congregation in Newport, Rhode Island:

> All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.[31]

Also, similarly, he wrote to the Members of the New Church in Baltimore:

> We have abundant reason to rejoice, that in this land, the light of truth and reason has triumphed over the power of bigotry and superstition, and that every person here may worship God according to the dictates of his own heart. In this enlightened age, and in this land of equal liberty, it is our boast, that a man's religious tenets will not forfeit the protection of the laws, nor deprive him of the right of attaining and holding the highest offices that are known in the United States.[32]

Intent of "Free Exercise"

Concerning the intent of free exercise at the time it was written into the Bill of Rights, there seems to be no serious question, despite the passing of almost two hundred years. It is to be remembered that even more important to the early settlers of this land than the irritating presence of an established state church were the problems many of them encountered in trying to practice their religion as their conscience, or spiritual sensitivity, directed.

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[31] Ibid., p. 18.

[32] Ibid.

Indeed, in some instances, they were even willing to pay the religious assessment that went to the established church if such enabled them to have surcease from any harassment or persecution because of their particular belief or mode of expressing it. This was true in the Massachusetts colony and it was also true in some of the counties in Virginia prior to the revolution.

The history of the colonial struggle for religious liberty demonstrated, above all else, that the people wanted to be free to follow their consciences. They readily recognized that, inasmuch as "in union there is strength", the colonies were more or less bound to each other in the common defense following the break with the mother country. However, they placed a price on such collective security. They insisted upon effective, realizable guarantees against encroachment by the new government upon their personal liberty and particularly upon their religious freedom.

This was, by the nature of things in that day, related to the fact of establishment, but if establishment at the national level were not prevented, it is quite possible that the people would have settled for free exercise if it were accompanied by some guarantee to the effect that no establishment, were there perchance to be one, would be able to deny others the inherent freedom of conscience to which the Creator entitled them. Although there was indeed bitter opposition to the established church in those states where such existed, because of the threat they posed to the religious liberty of others, the main objective was to guarantee the free exercise of religion to all people

within the new republic. This, the second half of the religion clause of the First Amendment provided without question. The Baptists readily accepted this as being fully adequate, and they were perhaps the most insistent protagonists for such.[33]

But, proceeding down the years since the adoption of the First Amendment, the interpretation or meaning of free exercise has been something else again. This is particularly true since the passage of the Fourteenth Amendment. The Supreme Court has been called upon many times to clarify the meaning of the second clause in the amendment, and has exhibited a degree of confusion and contradiction in the process.

Supreme Court Viewpoint

The Court has been asked to determine the constitutionality of certain acts of a particular religious sect--the Jehovah's Witnesses--in a number of cases. In one of these decisions, delivered in 1943, it decreed that free exercise includes the right to sell pamphlets on the streets, and worship in a more conventional manner as well, and also to knock on the door or ring the door-bell of a person's home to leave literature or discuss their particular doctrine.

But again, in this instance, as in the case previously mentioned (The New Jersey bus transportation case), Justice Jackson voiced strong opposition.

> In my view the First Amendment assures the broadest tolerable exercise of free press, free assembly, not merely for religious purposes, but for political, economic, scientific, news, or

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[33] Cf. supra, p. 76.

> informational ends as well. When limits are reached which such communications must observe, can one go farther under the cloak of religious evangelism? Does what is obscene, or commercial, or abusive, or inciting become less so if employed to promote a religious ideology?
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> . . . It may be asked why then does the First Amendment separately mention free exercise of religion? The history of religious persecution gives the answer. Religion needed specific protection because it was subject to attack from a separate quarter. It was often claimed that one was an heretic and guilty of blasphemy because he failed to conform in mere belief or in support of prevailing institutions and theology. It was to assure religious teaching as much freedom as secular discussion, rather than to assure it greater license, that led to its separate statement. . . .
>
> For a stranger to corner a man in his home, summon him to the door and put him in the position either of arguing his religion or of ordering one of unknown disposition to leave is a questionable use of religious freedom. . . .
>
> This court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.[34]

Some further examples of the Supreme Court's opinions on free exercise may help place the matter in perspective. For example, on one occasion the Court stated that the First Amendment

> . . . was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.[35]

In another instance the Court declared:

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[34]Dumbauld, op. cit., pp. 112-13.

[35]Constitution of the United States of America, pp. 854-55.

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand it forestalls compulsion by law of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. . . . the Amendment embraces two concepts, --freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.[36]

This latter statement suggests something to which Justice Jackson spoke when giving his opinion on the Jehovah's Witness case above. There are times when that which would perhaps be regarded as free exercise of religion may be so obnoxious, or against the public interest, or interferes with the rights of others, that certain restraints must be placed upon the perpetrators thereof. That is to say, an act performed under the aegis of religious freedom cannot be justified if it in any way conflicts with the moral law, or the criminal law of the land.

Thus the Court opined: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[37] The best known application of such a viewpoint involves the Mormon church and the prohibition thereon of engaging in polygamy for the reason that it is inimical to the general welfare of society as a whole.

Involved in other decisions related to federal restraints, the Court has, for example, sustained the application to vendors of

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[36] Ibid., p. 855.

[37] Ibid., p. 856.

religious books of a nondiscriminative license fee, only to vacate and formally reverse that decision eleven months later. Such incongruities are not uncommon, and numerous other similar decisions have been made. These stated herein are sufficient to indicate the conflicting directions that the Court has sometimes taken in addressing itself to the question of the application of the free exercise clause.

The Court has made an interesting decision with respect to Sunday closing laws (Blue Laws). It found that these have been separated from their religious background for so long that their present application are for secular reasons, providing a uniform day of rest and recreation for the people, that they are therefore not in violation of the free exercise clause of the First Amendment. The considerations involved in this have been given as follows:

> 1. the belief that, in a cosmopolitan society with a multitude of sects, uniform treatment of all would be impracticable, or, at best, would transfer the competitive disadvantage to a majority of voluntary Sunday observers;
>
> 2. administrative difficulties encountered in policing an optional one-day-of-rest-in-seven would be excessive;
>
> 3. employers, with a view to operating on Sunday and closing on the least profitable day of the week, might be tempted to falsify their religious belief, a form of evasion difficult to detect;
>
> 4. that employers, granted an exemption enabling them to operate on Sunday, might be induced to hire only their own co-religionists, a form of discrimination; and
>
> 5. that the noise and activity generated by those operating on Sunday would detract appreciably from the peace and quiet

> otherwise enjoyed by Sunday observers, and would reduce the opportunity for families working for different employers to have their day of rest and recreation fall on the same day with resultant association with each other.[38]

It is not within the scope of this study to attempt a systematic analysis of the Supreme Court's decisions, but simply to cite instances which reflect the complexity of such a seemingly simple concept as the free exercise of religion. One more basic observation may suffice to summarize the Court's thinking in this particular area.

Clear and Present Danger

In many of its decisions the Court has leaned rather heavily on what is referred to as the "clear and present danger doctrine". Even though the case involving Mormon polygamy, referred to above, was decided quite some time before the Court articulated its "clear and present danger doctrine", it falls into this category all the same.

While the doctrine appears to be generally a sound basis for reaching decisions involving the welfare of society as a whole, its application has led to a rather erratic record on the part of the Court. One or two examples may suffice.

Mention has already been made above of the difficulties encountered by the Jehovah's Witnesses in the practice of their faith. Most of these have involved their methods of propagating their beliefs. One of the first major cases adjudicated by the Court in such matters occurred in Connecticut where members of the sect were convicted, under state law, of unlicensed solicitation of funds for religious

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[38] Ibid., p. 859.

or charitable purposes, and on a general charge of breach of the peace by their actions in a predominantly Roman Catholic neighborhood, confronting two members of that faith and playing a phonograph record blatantly insulting the Christian religion in general and the Catholic church in particular.

The Court reversed both convictions on the ground that they violated constitutional guarantees of freedom of speech and religion. The Court considered the clear and present danger rule in making its decision, indicating that its application in this instance was not critical.

And yet, just two weeks later, the Court went to the other extreme, opining that state legislative acts are generally presumed to be constitutional, and sustaining a Pennsylvania law which excluded from its schools children who, for religious reasons, would not salute the flag. Then, a year later, the Court completely reversed itself.

The foregoing analysis of the free exercise clause would seem to indicate that, so far as the founding fathers were concerned, the meaning was quite simple and direct, issuing from the intense feeling of the people for an unquestionable guarantee of religious freedom.

The passage of time, on the other hand, accompanied by the myriad sociological, and even technological, changes, especially in the twentieth century, has apparently complicated the meaning of free exercise, so that interpretation has become increasingly difficult, both for the local courts and for the Supreme Court. Like the establishment clause, free exercise does indeed seem to be no easy

question to resolve nor to adjudicate.

SUMMARY ON THE RELIGION CLAUSE

In concluding this chapter, perhaps a few general observations are in order, and might, hopefully, prove helpful. One of these concerns the question of the intent of the word religion. It is, of course, the central word in the first line of the First Amendment.

Justice Rutledge, during the hearing of the New Jersey Bus Transportation case, wrote a dissenting opinion which various scholars recognize as displaying singular research into the question of religion in the First Amendment. He wrote:

> "Religion" appears only once in the Amendment, but the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof". "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other. . . . Denial or abridgement of religious freedom was a violation of rights both of conscience and of natural equality. State aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference. "Establishment" and "free exercise" were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom.[39]

Familiar Words and Phrases

In reading what various constitutional students have to say on the subject of the First Amendment, we find that some would imply too

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[39]Conrad Henry Moehlman, The American Constitution and Religion (Berne: Privately Printed, 1938), p. 52.

much is being made of these now familiar words or phrases, such as religious liberty, church and state, wall of separation, freedom of conscience, and, particularly, "separation of church and state". Pfeffer speaks to the intrinsic value of these concepts:

> It is true, of course, that the phrase "separation of church and state" does not appear in the Constitution. But it was inevitable that some convenient terms should come into existence to verbalize a principle so clearly and widely held by the American people. . . . the phrase "Bill of Rights" (is) a convenient term to designate the freedoms guaranteed in the first ten amendments . . . (but) does not appear in the Constitution. . . . who would deny that "religious liberty" is a constitutional principle? Yet that phrase too is not in the Constitution.[40]

Pfeffer then goes on to observe that all such terms as those listed above have had such universal acceptance in America that they have become integral parts of a basic American principle.

Moehlman provides insight into the meaning of these various concepts by reviewing their connotation in the colonial development thereof. Speaking of liberty, for example, he observes that "The liberty insisted upon for a century before the adoption of the American Bill of Rights was 'absolute liberty, just and true liberty, equal and impartial liberty'."[41]

Of freedom of conscience he writes: "Freedom of conscience means no compulsory support of churches that one's conscience does not permit one to attend."[42]

Of establishment, he suggests that it ". . . refers not only to

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[40]Pfeffer, op. cit., p. 119.

[41]Moehlman, op. cit., p. 55.

[42]Ibid., p. 56.

a 'set-up' colonial church but also to any government-supported mode of securing a specific religious objective . . . "[43]

He also suggests pertinent meanings or synonyms for one of the key words in the religion clause--respecting.

> The word "respecting" in the phrase "respecting an establishment of religion" signifies "having regard to", "in relation to", "concerning", "about", "affecting", "touching", "bearing upon", "having to do with", "in reference to", "pertaining to", and so on.[44]

Cooley, who along with Storey is one of the early comprehensive interpreters of the Constitution, also enlightens the concept respecting with the opening sentence in his chapter Of Religious Liberty in which he says:

> A careful examination of the American constitutions will disclose the fact that nothing is more fully set forth or more plainly expressed than the determination of their authors to preserve and perpetuate religious liberty, and to guard against the slightest approach towards the establishment of an inequality in the civil and political rights of citizens, which shall have for its basis only their differences of religious belief.[45]

This, it would seem, elucidates quite well the intent of respecting an establishment of religion.

In order to complete the "church and state" picture, a few words should be given to a point of view which some writers hold. This is the idea or concept that the United States--from its very beginnings--has always been a "Christian nation". It suggests that the

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[43] Ibid.

[44] Ibid.

[45] Thomas M. Cooley, A Treatise on the Constitutional Limitations (Boston: Little, Brown, 1903), p. 571.

Constitution took into consideration the viewpoint of many of the colonial legislators and leaders, namely, that it should at least favor religion in general. This proposed application, in turn, has suggested to some that Christianity was the established religion of the nation, and that the First Amendment simply forbids any particular sect or group being given preference by the government.

If this argument is based fundamentally on the latter assumption, then it is a false argument. For surely the founding fathers, quite a few of whom were deists, would have agreed with Roger Williams' assertion that there was absolutely no such thing under the gospel as a Christian state.

In the academic circles of the time--Harvard, William and Mary, Yale, Princeton (College of New Jersey), and Dartmouth--skepticism was the order of the day. It was an atmosphere of questioning, and among some students deism was as likely to be the theological posture as was Christianity. Some of the most prominent leaders in the new government (including the first four presidents) were not members of any particular church. Washington appeared to be Christian in attitude and outlook, however, as did Madison. Jefferson appears to have been Unitarian, as does Adams also, and both tended towards a type of deism.

Beth suggests that the argument for the Constitution supporting Christianity in general could be false:

> . . . even if one grants its historical premise that the nation was prevailingly Christian in 1790. For there is no reason why good, even fanatic, Christians might not as a part of their faith renounce any support from the state, as Roger Williams, Isaac Backus, James Iredell, and the Baptists and Quakers

> generally urged. In their view the state is non-Christian and non-religious; if the people are Christian it is because they have freely chosen to be so, not because any law or Constitution has so enacted.[46]

Religious Attitude of Congressmen

However, the argument that the United States was not a Christian nation at the time of its founding, though correct, does not suggest that the elected representatives of the new nation were irreligious. On the contrary, it is quite evident from historical analysis that the founding fathers were very religious, and that they recognized the value and the place of religion in a government "of the people, by the people, and for the people".

What is quite true, though, is that those same leaders, in the main, assumed that man's religion should be free from any intervention by the state, and it was upon this assumption that they formulated the charter of religious liberty for the new nation--the first Amendment to the Constitution.

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[46]Loren P. Beth, The American Theory of Church and State (Gainesville: University of Florida Press, 1958), p. 75.

CHAPTER IV

SOME CONCLUSIONS AND IMPLICATIONS

There appears to be general agreement among historians and specialists in civil government that the Constitution of the United States of America, with the first ten amendments that accompany it, is a unique document. Nothing truly akin to it is to be found prior to its formulation and adoption.

The framers of the Constitution worked long and diligently at their task. This included a careful search of documents which established and empowered other governments preceding the American experiment. They searched ancient history--Greece and Rome--for models. They examined different forms of those republics, realizing that the weaknesses inherent in them led ultimately to their downfall and destruction. The framers also examined the governmental structure of contemporary states in Europe, and found that none of them was quite suitable for the peculiar needs of the new nation.

Truly it is a testimony to the convictions of the founding fathers, including their acknowledgement of, and dependence upon, a higher Being, and to their determined dedication to the cause of liberty, that the Constitution finally came through the refining fires of debate, adjustment, writing and re-writing, and, ultimately, ratification by the respective states, to be an effective, workable document under which the new republic could govern itself.

As someone has well said:

> The Constitution, founded on compromises, made serviceable by its elasticity, and supplemented by an imperfect bill of rights, is a two-handed sword supporting the Federal Government and yet ever ready to serve its purpose in defending the dignity of the State. . . . The supremacy of the Supreme Court, the power of the Executive, and the legislative authority of Congress unite in creating a well knit triune government such as was new in the history of mankind.[1]

True, many of its provisions, particularly those embodied in the Bill of Rights, have their roots in such ancient documents as the Magna Carta. The struggle for religious freedom, particularly, has its antecedents, many bloody and brutal, in a long and violent history, as this study has attempted to show. Nevertheless, not only much of its content, but also its structure and design, was uniquely new. It was greeted with approbation and unfeigned admiration by lovers of liberty on the European continent and, later, in other parts of the world.

Since its adoption, its application to the problems faced by the government have been generally wise, prudent, and made in the interests of the people. This, too, has not gone unnoticed in other parts of the North American continent and of the world.

However, in some areas of application there has been left much to be desired. It is precisely this fact which prompted this present study. In its pursuit an effort has been made to give a careful analysis of the genesis and development of the First Amendment, as well as a thoughtful survey of its meaning and intent as seen through the eyes of the founding fathers, subsequent interpreters, and

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[1]Mabel Hill (comp.), Liberty Documents (New York: Longmans, Green, 1901), p. 244.

the Supreme Court.

In attempting to draw some meaningful conclusions from this study, we shall begin with a summary of the religious posture of this nation and its people. This was touched upon in the concluding paragraphs of the previous chapter. The apprehension and understanding of it should make more plausible the conclusions and implications subsequently suggested herein.

SOME CONCLUSIONS

The conclusions suggested in this study are based upon the assumption of the writer that this nation has been historically, and is today, a religious nation. It is not assumed to be a totally religious nation, but a predominantly religious nation. It is this writer's conviction that the assumption can be affirmed and documented.

Some historians have even gone so far as to suggest, and a few have insisted, that this nation is not only a religious nation--it is a Christian nation (despite the fact that George Washington, during his presidency, in speaking to the proposed treaty with Tripoli, categorically denied this).

Religious Posture of this Nation

This religious posture, or attitude, was first demonstrated in the lives of the early settlers of this land, and more articulately in the thoughts, words and deeds of the leaders of the new government. A review of some of the most prominent should serve to document this during the revolutionary period and the first century following.

Documentation of this Assumption

The most significant beginning of this documentation is to be found in the Declaration of Independence. It declared the rationale of the revolt which led to separation, and includes four sentences which amply display a religious attitude. These sentences are as follows:

> When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to separation.
>
> We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness.
>
> We, therefore, the representatives of the United States of America, in general Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions do . . . declare that these united colonies are, and of right ought to be, free and independent states; . . .
>
> And, for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.[2]

The second documentation is to be found in The Articles of Confederation adopted by the second Continental Congress on November 15, 1777, and ratified by the 13th state, Maryland, on March 1, 1781. Two sections of the Articles reflect a religious concern. The first, in Article III, states that:

> The said states hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their Liberties, and their mutual and general welfare,

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[2]Emphasis added.

> binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever . . .

The second statement reflective of religious concern is in the concluding paragraph.

> AND WHEREAS it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union . . .

Subsequent sessions of the Continental Congress attempted a revision of the Articles and instead drafted the new Constitution. It is to be recalled that Rhode Island was satisfied with the Articles' clauses which were protective of religious freedom, and therefore did not want to see it tampered with, refusing to send delegates to the Congress for re-writing the Articles or drafting a new constitution. Furthermore, that state withheld ratification until it was assured that adequate protection of such rights were added to the constitution.[3]

Virginia's Act for Establishing Religious Freedom, the Constitution of the United States of America, and the first ten amendments appended thereto, quite obviously reflect the religious attitude of the new nation. The founders of the republic were religious men. They varied, certainly, in the degree of interest and dedication in such matters, and, theologically, were of differing persuasions, not all of them being Christian, and some only nominally so. But, they were religious men. The following examples demon-

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[3]Cf. supra, pp. 50, 51; 70, 71.

strate this.

Attitudes of Early Presidents

First of all, consider George Washington, leader of the Continental Army and first president of the United States. His first inaugural address, delivered on April 30, 1789, contained significant references to dependence upon God.

> Such being the impression under which I have, in obedience to the public summons, repaired to the present station, it would be peculiarly improper to omit in this first official act my fervent supplication to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes . . . In tendering this homage to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own, nor those of my fellow-citizens at large less than either. No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency. . . . You will join with me, I trust, in thinking that there are none under the influence of which the proceedings of a new and free government can more auspiciously commence. . . .
>
> . . . since we ought to be no less persuaded that the propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right which Heaven itself has ordained; . . .
>
> I shall take my present leave, but not without resorting once more to the benign Parent of the Human Race in humble supplication that, since He has been pleased to favor the American people . . . so His divine blessing may be equally conspicuous . . .[4]

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[4]Charles Wesley Lowry, To Pray Or Not To Pray (Washington: University Press of Washington, D.C., 1963), pp. 198-200; emphasis added.

In his farewell address, delivered on September 17, 1796, as he retired to Mt. Vernon and a well-earned rest, he said:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports . . . Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? . . . reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle. . . .
>
> Though in reviewing the incidents of my Administration I am unconscious of intentional error, I am nevertheless too sensible of my defects not to think it probable that I may have committed many errors. Whatever they may be, I fervently beseech the Almighty to avert or mitigate the evils to which they may tend.[5]

The records of Congress show that both Houses recommended the example of President Washington's farewell address to be followed by those who succeeded him in that office. The second president, John Adams of Massachusetts, reflects a like commitment in his inaugural address.

> . . . I feel it to be my duty to add, if a veneration for the religion of a people who profess and call themselves Christians, and a fixed resolution to consider a decent respect for Christianity among the best recommendations for the public service, can enable me in any degree to comply with your wishes, it shall be my strenuous endeavor that this sagacious injunction of the two Houses shall not be without effect. . . .
>
> And may that Being who is supreme over all, the Patron of Order, the Fountain of Justice, and the Protector in all ages of the world of virtuous liberty, continue His blessing upon this nation and its Government and give it all possible success and duration consistent with the ends of His providence.[6]

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[5] Ibid., p. 201.

[6] Ibid., pp. 215-216.

Thomas Jefferson's religious orientation has been acknowledged elsewhere in this study. However, his first and second inaugural addresses further document his acknowledgement of religious principles. On March 4, 1801, he said:

> . . . enlightened by a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty, truth, temperance, gratitude, and the love of man; acknowledging and adoring an overruling Providence, which, by all its dispensations proves that it delights in the happiness of man here and his greater happiness hereafter . . .[7]

On March 4, 1805, he said:

> I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land . . . who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, . . .[8]

Jefferson often made similar references in his correspondence, particularly, as would be expected, when writing to religious organizations or associations. He wrote to the Baltimore Baptist Association (October 17, 1808) a letter which included these references to religion:

> Excited by wrongs to reject a foreign government which directed our concerns according to its own interests, and not to ours, the principles which justified us were obvious to all understandings, they were imprinted in the breast of every human being; and Providence ever pleases to direct the issue of our contest in favor of that side where justice was. . . .

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[7] Ibid., p. 216.

[8] Ibid., p. 217.

> I return your kind prayers with supplications to the same almighty Being for your future welfare and that of our beloved country.[9]

Jefferson did not profess the Christian faith as such. He apparently had a deep-seated aversion to the organized church and its teachings, which he believed to be inaccurate reflections of the teachings of Jesus. He considered religion to be a matter entirely "between our God and our consciences for which we were accountable to him, and not to the priests. I never told my religion nor scrutinized that of another."[10]

He affirmed that he judged the religion of other persons by their lives, and assumed that everyone would judge his in the same manner. He gave the denominationalists rather rough treatment, particularly the Calvinists (because he considered the latter's dogmatism demoralizing), but he had a deep and genuine appreciation for what he called the "simple doctrines" of Jesus. Jefferson was a religious man.

James Madison followed Jefferson into the presidency, and echoed similar sentiments. In his inaugural address of March 4, 1809, he said, in part:

> . . . But the source to which I look or the aids which alone can supply my deficiencies is in the well-tried intelligence and virtue of my fellow-citizens, and in the counsels of those representing them in the other departments associated in the care of the national interests. In these my confidence will under every difficulty be best placed, next to that which we have all

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[9]Saul Kussiel Padover, The Complete Jefferson (New York: Duell, Sloan & Pearce, 1943), p. 537.

[10]Ibid., p. 955.

> been encouraged to feel in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.[11]

President John Quincy Adams affirmed his religious inclinations in his inaugural address delivered on March 4, 1825. Included in his remarks was the following:

> . . . I shall look for whatever success may attend my public service; and knowing that "except the Lord keep the city the watchman waketh but in vain," with fervent supplications for His favor, to His overruling providence I commit with humble but fearless confidence my own fate and the future destinies of my country.[12]

Abraham Lincoln

Abraham Lincoln assumed the presidency just as the nation was on the brink of civil war. His inaugural address reflects his concern for this, and for what he apparently thought to be the inordinate power of the Supreme Court. Selected portions of that address reflect his religious sensitivity:

> Why should there not be a patent confidence in the ultimate justice of the people? . . . If the Almighty Ruler of nations, with his eternal truth and justice, be on your side of the North, or on yours of the South, that truth and that justice will surely prevail by the judgment of this great tribunal of the American people.

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[11]Lowry, op. cit., p. 217.

[12]Ibid., p. 218.

> . . . Intelligence, patriotism, Christianity, and a firm reliance on Him who has never yet forsaken this favored land, are still competent to adjust in the best way all our present difficulty.[13]

And, of course, his now memorable Gettysburg Address closed with the phrase that included words which were added to our pledge of allegiance during the Eisenhower administration: "that this nation, under God, shall have a new birth of freedom . . . "[14]

Without question, Lincoln was a very religious man. And, in the main, this has been true of our nation's leaders (though admittedly in varying degree) through all our country's history even up to the present time. President Eisenhower, baptized in the Christian faith after he became President, broke precedence by offering his own prayer to Almighty God at the time of his inauguration.

When our astronauts were circling the moon in 1967, their Christmas message to the world was read from the Book of Genesis. And even as this present study is undergoing composition, two astronauts have stood on the surface of the moon, and one of them quoted from the psalm: "When I consider the heavens, the work of Thy hands; the moon and the stars which Thou hast ordained. What is man, that Thou art mindful of him, or the son of man, that Thou visitest him?"[15] And as the President of the United States greeted the three astronauts on

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[13] Ibid., pp. 204-05.

[14] Ibid., p. 206.

[15] Psalm 8: 3 (Authorized).

their return from the moon to the earth, he completed the official welcome with the request that the ship's chaplain offer prayer to God in thanksgiving for the success of the mission and the safe return of the adventurers.[16]

Supreme Court Decisions

During the first century following the adoption of the Constitution and the Bill of Rights, the Supreme Court made its decisions on this premise, that ours is a religious nation, and we are a religious people. In the middle of the last century Mr. Justice Story declared: "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania." And toward the end of the century, in his Commentaries on the Constitution, he wrote:

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.[17]

In 1892 Mr. Justice Brewer stated: "These . . . add a volume of unofficial declarations to the mass of organic utterances that this is a Christian state." And, moving into the 20th century, Mr. Justice

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[16]Aboard the USS Hornet in the south Pacific, July 24, 1969.

[17]Joseph Story, Commentaries on the Constitution of the United States (Boston: Little, Brown, 1891), II, 631.

Sutherland wrote, in 1931: "We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God."[18]

As late as mid-century Justice William O. Douglas reiterated the same theme (although he has since seemed to have changed his position or certainly his interpretation of it) in expressing the majority opinion of the court's decision:

> We are a religious people whose institutions presuppose a Supreme Being. . . . We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When state encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions. For it then respects the religious nature of our people and accomodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.[19]

Mr. Justice Goldberg more recently made a similar affirmation:

> Neither the state nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require it to do so.[20]

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[18]Lowry, op. cit., p. 41.

[19]Constitution of the United States of America (Washington: Government Printing Office, 1964), pp. 850-51.

[20]Albert George Huegli (ed.), Church and State Under God (St. Louis: Concordia, 1964), pp. 287-88.

General Evidences

Evidence that this nation is a religious nation is provided in two additional, and very pertinent ways. They might be referred to as general evidences. One of these relates to the fact that our entire legal system is replete with references to the ethical, moral standards of Christianity. Daniel Webster first made the connection specifically, when he declared:

> Christianity, general, tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and fagot are unknown, general, tolerant Christianity, is the law of the land.[21]

This sounds quite definite, even arbitrary, and it has been interpreted differently by different persons. It would seem reasonable, however, to assume that the statement reflects the recognition that many of the principles found in our laws come from the Christian Bible (at least half of the Ten Commandments have found their way into the statute books in various forms, for example). One hears such phrases as "the alpha and omega of our moral law and the power which directs the operation of our judicial system" and supports the administration of state and local, as well as national, government, applying to everyone those broad, inclusive principles that include all believers.

This is not to say, of course, that all Christian doctrines or precepts are part of the law, nor are they, certainly, enforceable by

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[21]Miner Searle Bates, Religious Liberty: An Inquiry (New York: Harper & Bros., 1945), p. 532.

law. They are commendable and worthy, but must be accepted as a matter of faith and conviction, rather than by fiat. Nevertheless they can be made effective by virtue of the way in which the law is applied.

The other general evidence of the religious attitude of America is found in the customs and practices of the nation, its government, and its institutions. There is scarcely need to document these; they are common knowledge to everyone, including the child in elementary school, and to some even younger, via the television.

The Continental Congress included numerous and varied religious phrases and references in its proclamations and state papers. Names, or attributes, for God were used, written and oral, some of them being distinctively Christian in origin. The Congress established chaplaincies in both Houses, paying for them with government funds. Chaplains were recruited for the Army and the Navy. Congress opens its daily sessions with prayer; there is today a prayer room in the Capitol building, and the President holds frequent prayer breakfasts in the White House.

More obvious is the "In God We Trust" on the nation's coinage, and, more recently, "one nation under God" in the salute to the flag. Many state occasions, both federal and local, include prayer by representative clergymen of different faiths, the Presidential Inaugural being one of the foremost examples, and the state funeral of a late president being another.

National celebrations, such as Thanksgiving Day, Memorial Day,

and Independence Day are national holidays with religious overtones. Thanksgiving Day is always heralded by a proclamation of the President which amounts to a call to prayer. In the early history of the country, national fast days were proclaimed by Congress. Religion, or the concern of man and his relationship to a Supreme Being, was a very vital part of the warp and woof of this nation's founding. It is still very much a part of the nation's life and practice.

Numerically speaking, the largest percentage of religious people in the nation is Christian, and the number of "card carrying" Christians is swelled by numerous others who are constituents, and attend a Christian church occasionally, and may contribute financially to one every now and then, but whose names do not appear on the roll of any Christian church. It must be granted also, that there are many irreligious, and even non-religious citizens of this land, but percentage-wise the latter are relatively few. So, in a certain sense, the United States cannot truly be called a "Christian nation", and yet, when compared with oriental nations which are distinctively Buddhist, for example, or Arab nations which are predominantly Moslem, this country could be called a Christian country. Nevertheless, be that as it may, the United States is and always has been a religious country and people.

The customs of the people individually and communally also support this second generalization. Witness the thousands of churches (buildings) that dot the landscape from shore to shore and border to border. Whenever a new residential development is planned, space for

one or more church buildings is included, just as are spaces for schools, markets, banks, and shopping centers. Hundreds of church related schools across the country also bear testimony to the religious nature of the people. Alexis De Tocqueville once said:

> There is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in America. By regulating domestic life it regulates the state. Religion is the foremost of the institutions in the country. I am certain that the Americans hold religion to be indispensable to the maintenance of republican institutions.[22]

It is imperative that this religious climate and attitude be recognized as a vital part of this nation's mores, as well as of its law and government. Warnings are abundant on all sides of the fate that has overtaken nations in the past, which have allowed their religion to slip away from the focal point it once held. Religion is central to this nation's very being; from its birth, through its growing pains, and in its young adulthood.

Centrality of Religion

The founding fathers depended upon it, and showed their descendents the way. From the very first meeting of the Continental Congress, religion was one of the chief concerns. There was prevalent a profound appreciation of the religious responsibilities of the people's representatives.

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[22]Alexis de Tocqueville, Democracy in America (New York: Dearborn, 1838), I, 285, 286.

> The founders of the republic invoked God in their civil assemblies, sought guidance for their political actions from their religious leaders, and recognized the precepts of their Bible as sound political maxims.[23]

Justice Joseph Story, from his long experience as a member of the Supreme Court, sums this up rather well when he observes:

> The promulgation of the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; . . . the cultivation of all the personal, social and benevolent virtues, these never can be a matter of indifference in any well-ordered community. It is, indeed, difficult to conceive how any civilized society can well exist without them.[24]

The foregoing discussion has to do with religion--not with the Church, although admittedly the two are related. Assuming that the above is a valid assumption, the people of this nation have a right to assume that the influence of religion will continue to be seen in the actions of the legislative bodies of the land, both national and state, and in the decisions of the Supreme Court and lesser judicatories as well (cf. p. 152). The recognition of the place that religion has and continues to have in the life of the nation, is essential to any attempt at understanding the meaning and intent of the religion clause of the First Amendment.

"Establishment" Clause

Conclusion 1. The clause, respecting an establishment of

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[23]Edward Frank Humphrey, Nationalism and Religion in America (Boston: Chipman, 1924), p. 407.

[24]Story, op. cit., p. 628.

religion, has a broader meaning than simply a "national Church" or a "state Church", and it has had this broader meaning ever since it was written into the First Amendment and, in a sense, even before. This conclusion is reached as a result of an examination of the evolution of the clause from a rather complex initial statement (proposed by Madison) to its simple, final wording, plus an analysis of the article "an" as used in the clause.

Madison's original proposal was:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.[25]

The first clause is a variant of the free exercise thereof clause in the final version of the First Amendment. The second clause has a very definite and limited purpose, and is so stated. Madison wanted no specific Church to be set up as a national Church. The rights of conscience clause appears to be a repetition of the first clause, amplified to include other matters of conscience than those simply religious.

The committee appointed by the House to study the matter and report back to that body came up with a much shorter, and simpler statement: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."[26]

Evidently the committee decided that the first and last clauses

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[25] Cf. supra, p. 61.

[26] Cf. supra, p. 63.

in Madison's proposal duplicated each other, and thus dropped the first clause, leaving the last as Madison had originally worded it. Furthermore, one "civil right", that of holding office without the qualification of a "religious test", was already covered by the Constitution (Article VI). The no religion shall be established by law clause is essentially the same as Madison's, simply intending that no "state Church" could be established by the new government.

The second change came following the committee's report back to the House: "Congress shall make no law establishing religion or prohibiting the exercise thereof, nor shall the rights of conscience be infringed."[27]

For the first time "Congress" enters the picture. One may wonder why it was deemed necessary, since no federal laws could be made by anyone but Congress. It seems redundant, but perhaps was included for emphasis and/or further assurance to the electorate. The clause remains the same as the previous two with respect to its intent; no "state Church" was to be set up by the government.

Between the House endorsement of this version and its transmittal to the Senate for its review, one of the Congressmen (Elbridge Gerry, Massachusetts) proposed that the clause should read "no religious doctrine shall be established by law".[28]

Here, for the first time, there appears to be specific reference to a Church or religious organization. Gerry may have

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[27] Ibid.

[28] Cf. supra, p. 64.

thought his wording would prevent the setting up of a national Church which would be contrary to the state Church already established in Massachusetts. Or, since there were other "religions" in the colonies in addition to Roman Catholic and Protestant Christianity, he wanted to make sure none would have any preference over the others. Also, he may have felt there was some ambiguity in the word "establishment".

The third change came following the Senate debate on the House recommendations, and for the first time a significant variation of the first clause appears. "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion . . ."[29]

The phrase, establishing articles of faith, is significant because it is more definitive than the general term "religion". Congress is not to decree what anyone is to believe, nor prescribe the manner in which anyone is to express that belief. Furthermore, the phrase gets away from any thought that the government would eschew all religion, thus answering the fears of some that the government was seeking to "abolish religion entirely" or "aid those who professed no religion at all".[30]

It is to be noted also that the Senate dropped Madison's clause, "nor shall the rights of conscience be infringed". The Senators evidently felt that freedom of religion, speech, press and assembly fairly well covered "rights of conscience", and therefore the

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[29] Cf. supra, p. 67.

[30] Cf. supra, p. 64.

clause, if included, would be redundant.

The fourth, and final, change came when the Senate version went back to the House for review. The disagreement was obvious, and a conference committee of Representatives and Senators met to iron out the differences. The religion clause then read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."[31]

The final version is short and to the point. Granted, it is not explicit, and a number of constitutional students have objected to the fact that Congress was not more specific in spelling out its precise intent. But, looking at the evolution of the amendment and the debates that brought it to its final form, one recognizes that the founding fathers no longer felt the need to make it so.

"Respecting" an Establishment

The phrase, respecting an establishment of religion, seems to encapsulate all the desires, concerns, and intents the framers expressed in the extensive and, doubtless, heated debates which brought it forth. And, as has already been intimated herein, the modifying article, an, is significant. It indicates a much broader application than that of simply setting up an official governmental Church. It is this latter, limited application which enabled commentators mentioned heretofore to slip into the careless substitution of the article the. The definite article, the, is more specific and refers solely to an act

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[31]Cf. supra, p. 69.

of government which would set up a governmental Church. The indefinite article, an, broadens Congressional limitation. Combined with respecting, it indicates that the government shall make no law affecting any "establishment of religion"; i.e., any Church, or synagogue, or mosque (using these terms organizationally rather than architecturally), etc. In short, no laws could be passed affecting any religious organization of any type, shape or form.

Madison's Use of Clause

Madison reflected this broader application when he used the words "a religious establishment" in vetoing two bills proposed by the House of Representatives during his presidency.[32] In neither of these cases was there any question of government establishing a particular Church as the national church. In each case it was a matter of the government not "intermeddling" in the affairs of a religious organization (Church). In the case of the Baptist church away out in the Mississippi territory, it would mean giving aid of a special sort (namely, providing property) to that particular establishment (Church). His particular phrasing reflected the same meaning and intent as the wording in the amendment.

A further observation, however, must be made in order to set the foregoing in proper perspective. The word "establishment" had a much more inclusive meaning in that day than subsequent interpreters are prone to give it. In the thinking of the Congressional leaders any

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[32]Cf. supra, p. 95.

Church, and especially any of more than average size and "influence", was an establishment--a religious establishment. The Church of England was the "establishment" in Virginia (at least until the passage of Virginia's Act for Establishing Religious Freedom, when the "establishment", then "disestablished", became the Protestant Episcopal Church). The Congregational Church was the "establishment" in Massachusetts, and at that point in time had not yet been "disestablished". The Presbyterian Church, because of its size and influence, was the "establishment" in Pennsylvania, even though it was never officially recognized as such (as was the Episcopal in Virginia and the Congregational in Massachusetts). One of its leaders, John Witherspoon, wielded considerable influence during and following the revolution, being the only clergyman to sign the Declaration of Independence.

Broader Meaning of "Establishment"

Any Church, especially any that was able to exercise any degree of influence upon the body politic, was an "establishment". Therefore, Madison and his contemporaries broadened their concept beyond any sole and narrow notion of a Church sponsored by the government.

And this attitude toward the Church has persisted even to this day, when one hears cries that "you can't buck the establishment", and so-called "underground" churches are being established to escape the power and pressure of the organized, institutional, denominational Church.

"Congress shall make no law respecting an establishment of

religion . . ." As this writer sees it, this means that neither Congress nor any other part of the federal government can legislate or act to promote, interfere with (save in the case of actions clearly opposed to the public welfare), or aid any ecclesiastical body, organization, institution, or whatever.

Separation of Church and State Implied

Conclusion 2. The separation of church and state concept, though not mentioned as such in the First Amendment, is implicit in the religion clause and means just what it says. That is to say, Church and state are to remain separate, not religion and state. This derives from two essential factors.

First, the intent of the amendment itself, which was not in any way to abolish religion, but to keep the government out of the business of the churches, and keep the churches out of the business of the government.

Second, the religious orientation of the people and the leaders of the country, as described and documented in the previous pages.

Amongst some of the writers in the field of constitutional study, there appears to be a tendency to use the two terms ("Church" and "religion") interchangeably, insisting that the Constitution forbids any association between the churches (Church) and the state. Given the premise assumed above, as to the meaning and intent of the "establishment" clause, this indiscriminate assumption is an incorrect one. Other writers in the field attest to this error.

Jefferson's "Wall of Separation"

Thomas Jefferson, as we have seen, coined the phrase, a wall of separation between church and state. Lowry comments on this as follows:

> (Jefferson used) . . . the fateful phrase . . . as a description of the American system, despite the abundant certainty from many words and acts that this did not mean to him what it has come to mean to Bill of Rights absolutists today.
>
> . . . what both Virginians (Madison and Jefferson) feared was organized religious activity by churchmen, not religious influence or profession by all educated men of the time. Jefferson's "wall of separation" really meant to keep church and state apart, not to isolate religion from government or public life.[33]

Justice Thomas O. Douglas, in his opinion previously cited, went on to say:

> But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction.[34]

In this statement the Justice is distinguishing between the ideas, even the words, religion and church (sects). His concept of "neutrality" has given rise to some disagreement amongst his colleagues on the bench despite the fact that his use of the word "neutral" seems clear enough in this particular context. He appears to be using the

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[33]Lowry, op. cit., p. 37. (Emphasis added)

[34]Constitution of the United States of America, p. 851. (Emphasis added)

word to emphasize the truth that the government should not interfere with churches, sects, etc., neither to the extent of aiding them nor hindering them, and especially keeping out of the realm of the individual's personal religious life and expression.

After James Madison had retired from public life and repaired to his home in Charlottesville, he wrote a letter, in 1832, to the Rev. Jaspar Adams, commenting on a sermon the latter had sent him, the theme of which was the relation of Christianity to civil government. The Episcopal President of Charleston College in South Carolina had apparently tried to make a case for governmental endorsement and support of the "Christian Religion". Madison responded, in part, as follows:

> Until Holland ventured on the experiment of combining a liberal toleration with the establishment of a particular creed, it was taken for granted, that an exclusive & intolerant establishment was essential, and notwithstanding the light thrown on the subject by that experiment, the prevailing opinion in Europe, England not excepted, has been that Religion could not be preserved without the support of Government nor Government be supported without an established religion, that there must be at least an alliance of some sort between them.
>
> It remained for North America to bring the great & interesting subject to a fair, and finally to a decisive test.
> . . . . . .
>
> I must admit . . . that it may not be easy, in every possible case, to trace the <u>line of separation</u> between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points. The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded against

> by an entire abstinance of the Government from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others.[35]

Madison's "Line of Separation"

This bit of correspondence is interjected here in the discussion because of Madison's ever so slight variation on Jefferson's well-known phrase. The former used the term line of separation, possibly because a "line" is in fact not quite as discernible as a wall, figuratively speaking.

Mead, in an article published in Church and State,[36] suggests that Madison's term is more realistic in attempting to describe the concept. It is flexible, whereas the figure of a wall suggests a fixed impregnability, incapable of adjustment to meet the current needs in a given situation.

Mead utilizes this concept also as a means of supporting the Supreme Court's attitude of "flexibility" in decision making, pointing to the fact that positions of the Court do vary from time to time, depending upon the particular bias of the Justices then serving on the bench.

The same author also attempts a case for his belief that in this country there is no such thing as a church or a state; that these

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[35]James Madison, The Writings (New York: Putnam, 1904), IX, 484-488. (Emphasis added)

[36]Sidney E. Mead, "Neither Church nor State: Reflections on James Madison's 'Line of Separation'", Journal of Church and State, X:3 (Autumn 1968), 350-352.

terms applied to the situation in medieval Europe where church and state were inseparably united and the latter, through the medium of a single monarch, was virtually directed, if not controlled, by the former.

But this seems either to by-pass or ignore the viewpoint of the early leaders of the government, particularly Madison and Jefferson, who were quite aware of the existence of the Church and who saw in the civil government (even in such an enlightened republic as was then being instituted) at least the counterpart, if not the replica, of the then all too familiar Church and State of the continent.

The point is that the founding fathers were all too painfully aware of the threat of the Church establishment to the government, and vice versa. This was not a threat of religion; it was a threat from (and to) the institutional expression of religion, namely, the Church.

One must perhaps concede, however, that the figure of the line rather than the wall is possibly a more realistic description of the ever contemporary problem of applying the separation doctrine to specific situations as they arise.

Jefferson and the University of Virginia

Thomas Jefferson is perhaps one of the best examples of the founding fathers' recognition of the difference between religion and the establishment (Church). It is to be remembered that following his retirement from the presidency he devoted his efforts at Monticello to establishing in Charlottesville the University of Virginia. He not only set the educational "style" of the university, he designed the

architecture of the first buildings and their placement in the new campus.

This was to be a public university, supported by the State of Virginia. Jefferson served as the first Rector of the University, and in 1822 gave his views on the question of religious education at the University. Just prior to the chartering of the university in 1819, the Commissioners considered instituting a chair of divinity at the university, but rejected the plan, giving as their reason the conviction that church and state should remain separate. Jefferson commented on this as follows:

> It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his maker, and the duties resulting from these relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences. . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give to their students ready and convenient access and attendance on the scientific lectures at the University; . . . But always understanding that these schools shall be independent of the University and of each other. Such an arrangement would . . . fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion, the most inalienable and sacred of all human rights . . .[37]

Here, it may be seen, is one of the most ardent colonial protagonists for the separation of church and state recognizing that the principle did not at all suggest that the state ignore, or refuse

to recognize, the value of religion in the life and institutions of mankind.

The founding fathers, it may be conceded, desired keenly to separate the church from the state, but desired, with a like zeal, to hold paramount the place that religion and religious values and principles had, and should continue to have, in the life and destiny of the nation. This is a fundamental and most pertinent distinction to be made in any interpretation of the meaning and intent of the religion clause of the First Amendment.

Ambiguity of Supreme Court

Conclusion 3. The Supreme Court has exhibited a considerable degree of ambiguity and ambivalence in applying the religion clause of the First Amendment to contemporary situations.

In some instances it appears to have adhered very closely to the meaning and intent of the clause as seen by the founding fathers. Yet, the Court has changed its views; reversed itself--sometimes in the direction of compatibility with the clause; at other times in the direction of departure from the intent of the clause; re-thought and re-worded its rationale, trying, no doubt, to keep it in proper perspective to any given situation then under consideration. There is no doubt that part of the reason for this is the change in the personnel of the Court that takes place from time to time. Individual attitudes differ, and points of reference may vary. This is not intended as a criticism of the esteemed Justices, and certainly neither their integrity nor their ability in law is to be impugned. It may be

that there are flaws in the judicial system, or it may be that the Constitution itself is not sufficiently specific.

As mentioned heretofore, it is not within the scope of this present study to attempt any extensive analysis of the Supreme Court's decisions. It is necessary however, in support of this conclusion, to make some general observations supported by pertinent references.

For some reason difficult to perceive, the Court's decisions appear to be more closely aligned with the original meaning and intent of the First Amendment prior to the passage of the Fourteenth, than following it.

Section 1 of the latter affirms, in part, that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ." This was a long step toward complete guarantee of the enjoyment of civil liberties by every citizen of every state in the Union. It accomplished precisely what James Madison had attempted to accomplish when he persuaded the House of Representatives to include such a provision in the proposed amendments to the Constitution, and which was denied by the Senate. Had the Senate gone along with Madison's proposal, much confusion, not to mention bitterness, would have been avoided in the years that followed.

Fourteenth Amendment

It seems strange, also, that the Supreme Court did not begin to apply the religion clause of the First Amendment to the states through the Fourteenth Amendment until 1925, over fifty years following the

enactment of the latter amendment. In the years between 1868 and 1925, the Court was apparently concerned almost solely with the "due process of law" stipulation in the Fourteenth Amendment, which applied to the states what the Fifth Amendment had applied to the nation, and up to that time religious freedom did not involve this concept. It was only when private citizens began to bring suit against individual states for infringement of rights that the court looked more closely at the relationship between the First and Fourteenth Amendments. At that time the clause quoted above was considered to cover religious liberty as being one of many "privileges" which the states could not "abridge".

Changing Conditions

Possibly the main difficulty which contributes to the ambivalence and changeability of the Supreme Court is the fact that there is considerable difference in conditions--economic, social, political--between the twentieth century and the eighteenth. As one commentator reminds us:

> . . . most of the modern religious-freedom cases turn on issues which were at most academic in 1789 and perhaps did not exist at all. Public education was almost non-existent in 1789, and the question of religious education in public schools may not have been foreseen. And the use of loud-speakers in public parks was certainly not in the minds of the framers.

He then goes on to suggest that the historical argument may not apply as directly as it did in the century immediately following the adoption of the Bill of Rights. He writes:

> The justices, in short, must apply their own opinions of what Madison or Jefferson would think of the present-day problem if he were now alive--a process which is fraught with

> the possibility of error and which actually leaves the Court free to decide, as Justice Jackson once remarked, under "no law but our own prepossessions".[38]

The same commentator concluded that:

> . . . the study of judicial decisions on religious liberty becomes in reality not a study of law (not even "constitutional law") but an excursion into political philosophy.[39]

Move Toward Secularism

One of the dangers of this ambivalence and ambiguity on the part of the Supreme Court is that it may push the government, both national and state, in the direction of a complete secularism, particularly in the area of education. This, of course, would be completely antithetical to the religious posture of the nation as described in the opening section of the present chapter. It would seem to be a real danger. The Catholic writer, Parsons, comments:

> The present position of the Supreme Court is no longer based on the First and Fourteenth Amendments. In their place has been substituted a "constitutional principle" of separation of church and state, which it holds has evolved, and no doubt will evolve further, in the direction of complete secularism.[40]

From this observation he draws another deduction concerning the "method" of the Court.

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[38]Loren P. Beth, The American Theory of Church and State (Gainesville: University of Florida Press, 1958), p. 88.

[39]Ibid., p. 98.

[40]Wilfred Parsons, The First Freedom (New York: McMullen, 1948), p. 177.

> This being so, the Court's method is no longer judicial, based on legal and constitutional provisions and decisions, but frankly legislative. It interprets church-state relations on what it considers wise and prudent, as legislators do, not on what is the law of the nation.[41]

Actually, as has been emphasized more than once in this study, the First Amendment does indeed embody a constitutional "principle", and the Supreme Court has not "substituted" it for something else; it has simply emphasized it and highlighted it. The difficulty has come in some instances of mis-interpretation, or mis-application of the principle in specific situations. But there is no doubt that some of the decisions have been pointing in the direction of "complete secularism"; other writers have made similar warnings.

Supreme Court as "Final Authority"

It is also true that some of the decisions have bordered on the "legislative", particularly since they have involved specific interference with some of the laws of the individual states. (This view, also, is shared by other writers in the field.) There seems to be strong feeling on the part of a segment of the citizenry that the Court has acted beyond its jurisdiction in some instances.

In the Everson bus case (Everson vs Board of Education, New Jersey), for example, the court, by a very narrow margin of 5-4, approved the state statute which granted reimbursement for bus transportation to parents of all school children, including those attending Catholic parochial schools. Justice Black, in delivering the

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[41] Ibid.

majority opinion, comes very close to the dissenting opinion of Justice Jackson (cf. pp. 100, 101).

In two cases involving Bible reading and prayer in the public schools (Schempp vs Abington School District, Pennsylvania, and Murray vs Board of School Commissioners, Baltimore, Maryland) the court appears to have confused separation of church and state with separation of religion and state in putting down laws in the two states which permitted non-selective reading from the Bible, and the recitation of the Lord's Prayer, while explicitly and carefully excluding any children who, for reasons of conscience, did not wish to participate in this portion of the schools' programs. However, it is reasonable to assume that the Court in each instance has acted in good conscience, applying the best insight of which it is capable to each particular case that has come before it. Nevertheless, the Court continues to be ambiguous and ambivalent, and contradictory, as well.

Just one further observation on the Supreme Court, or the entire judiciary, for that matter. At least two of our nation's most prominent leaders in the past have spoken of what they feel to be the potentially inordinate power of the judiciary. The first was no less than the architect of religious freedom, Thomas Jefferson. After retiring from the Presidency, he wrote to T. Ritchie, in 1820, as follows:

> The judiciary of the United States is the subtle corp of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric. They

> are construing the constitution from a coordination of a general and special government to a general and supreme one alone. This will lay all things at their feet.[42]

In the same year he wrote to W. C. Jarvis in a similar vein:

> To consider the judges as the ultimate arbiters of all constitutional questions (is) a very dangerous doctrine indeed, and one which would place us under the despotism of oligarchy.[43]

And in 1821 he wrote to Pleasants: "It is a misnomer to call a government republican, in which a branch of the supreme power is independent of the nation."[44]

In his first inaugural address President Lincoln echoed something of Jefferson's concern about the Court. He said, in part:

> . . . the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges.[45]

Lincoln and Jefferson both were objecting to the system, rather than to the Justices, and saw certain weaknesses inherent therein. This may suggest that some way should be found to minimize the influence of the opinions of the justices, so that the principles of constitutional law shall be the major determinant in making their decisions. It may suggest that, in some instances at least, the Constitution itself might be made more specific.

Perhaps the observations of Jefferson and Lincoln, and others,

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[42]Lowry, op. cit., p. 138.

[43]Ibid. [44]Ibid. [45]Ibid., p. 203.

are not as serious as they may sound, but insofar as the First Amendment is concerned, very serious problems arise as the result of the vacillating ambivalence of the Supreme Court. Apropos of this is a very interesting analysis by Proctor of the dilemma posed by the Supreme Court.[46] It would seem that the Court needs some assistance from the law-makers in the form of guide lines for resolving the issues inherent in church-state relations. If the Court is to be consistent in its decisions, perhaps the Constitution itself may require amending in the direction of further specificity. This is one of the implications to be considered in the closing section of this chapter.

SOME IMPLICATIONS

Assuming the postulates presented in the preceding section of this chapter, it occurs to the writer that there may follow therefrom certain implications for at least those major areas of concern which trouble the Supreme Court and seem to plague a goodly portion of the religiously oriented public.

It occurs to the writer that there are at least four areas involving the religion clause of the First Amendment which appear to be most paramount. A detailed investigation would certainly suggest others. The four which come to mind as being most prominent are: 1) Questions involving public education (i.e., religious exercises in

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[46]William G. Proctor, Jr., "The Unsystematic Theology of the United States Supreme Court", Journal of Church and State, IX:1 (Winter 1967), 18-35.

the public schools, religious education in the schools, released time religious education, etc.); 2) Aid to parochial education (books, meals, bus transportation, etc.); 3) Tax exemption for churches, chaplaincies in governmental agencies, prayer at the opening of legislative bodies, etc.; 4) The rights of the majority and the rights of the minority in matters of religion as opposed to non-religion.

Religion and the Public Schools

With respect to the meaning and intent of the First Amendment, it is abundantly clear that there can be no sectarian religious education provided in the public schools. In terms of the religious posture of the country (historically and currently), it would seem that the values and attributes of religion can be provided in the curriculum of the public schools at virtually all grade levels.

The Supreme Court has indicated as much. For example, the Bible can be studied for its historical, cultural, ethical and literary qualities; it can even be used as a reference book for secular studies. The curriculum could include courses concerned with the history of religion and religions, courses in comparative religion, courses including the place which religion has had in the anthropological development of mankind and in the rise and fall of civilizations. Historical documents, such as the Declaration of Independence and the Gettysburg Address, Thanksgiving Proclamations, Inaugural Addresses, etc., all of which contain references to God, may be read in the schools. The National Anthem, which contains references to God, and similar anthems, non-sectarian in nature, may be sung in the schools,

and reference may be made to God on patriotic and ceremonial occasions.

Much furor was raised by the decision in the New York case involving the use of a prayer composed and prescribed by the Regents. This was caused by an inadvertently inaccurate reporting of the decision by the newsmedia in a headline which declared that the Supreme Court had banned prayer in the public schools. When the smoke had cleared, however, it was evident that the Court held that no governmental institution (the Regents) could act in this way because it violated the establishment clause of the First Amendment. Voluntary prayer by administrators, teachers and pupils is not in such violation, however.

The foregoing is illustrative of the recognition of the nation's religious inclination while avoiding sectarian involvement.

Released Time

The question of released time has caused ambivalent reaction amongst the professional leaders of the religious community. Some feel that it is not too effective, and, since it is disruptive of the school schedule, should be abandoned. Others feel that it is a valuable practice if carefully and properly planned and implemented. Basically it depends upon the manner in which it is handled, particularly with respect to the quality of the released time instruction. This writer has had experience with a well-planned, well-executed, well-taught released time program and found it most effective, meriting the approbation of the school authorities. On the other hand, he has also seen a similar program very weak and consequently

ineffective, drawing the criticism of the public school authorities.

Of course, it is also to be recognized that any such program is endorsed or rejected by the community depending upon the percentage of residents in the school district who favor this, as opposed to the percentage of those who do not. There are some communities in small towns in the southern states, for example, which are so homogeneous that there is complete support for all forms of religious expression in the public schools, including an almost sectarian emphasis. By all church and state standards, such would even be considered unconstitutional, if questioned, but in such a climate there is no one to question it.

The Supreme Court has approved released time which involves religion classes held elsewhere than on school property (sometimes referred to as "dismissed time"), while disapproving released time which involved religion classes held on the school property. As long as there is no coercion by the school authorities upon those students who do not wish to participate in religious exercises or released time, there would appear to be no violation of the First Amendment.

Aid to Religious Groups

The respecting an establishment clause in the First Amendment unmistakably precludes any aid of any type being given by the government, local or national, to any church organization, denomination, or group. The Supreme Court has emphasized this on different occasions, stating that the government is prevented from giving direct aid to "any religion, all religions, or no religion". However, it is in precisely

this area that the Court has been most changeable and ambivalent.

Barden Bill and Parochial Schools

Back in 1949, when the Barden Bill was presented to Congress, strong objection was raised by Roman Catholic leaders because the bill excluded all parochial schools from sharing in the appropriations proposed by the bill for public schools in the United States, Puerto Rico, Alaska, Hawaii and the Virgin Islands. The accusation of "discrimination against parochial schools" was made. Congressman Barden observed that no discrimination was made against any denominational schools; that the bill simply stated that no school except public schools shall participate in the funds.

Congressman Jacobs, a Roman Catholic, stated the rationale quite well when he said:

> As long as we have the same right to send our children to public schools as anyone else, we are not discriminated against. Our parochial schools are an adjunct of our religion. The issue is clear--either you have parochial schools and maintain them or accept public funds and convert the schools into public schools. As Catholics we do not have the right to a separately supported school system nor does any other group of people have such a right.[47]

Representative Barden summed up the First Amendment's position with this observation:

> I am astounded at this question being raised in the year 1949 when I thought it was so clearly and well settled as far back as the days of Roger Williams, Lord Baltimore, Thomas

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[47]Conrad Henry Moehlman, The American Constitution and Religion (Berne: Privately printed, 1938), p. xvi.

> Jefferson, and the members of the first Congress of the United States who were not only great leaders in, but exponents of, religious freedom and separation of church and state, regardless of the denomination.[48]

Voluntaryism

Moehlman sums up this American position of voluntaryism succinctly:

> Voluntaryism, or the separation of the churches from the state, is the American plan. It guarantees not only liberty of conscience for all types of faith or lack of faith but insists that the memberships of the various churches pay their own way, and that completely, in the building of churches and of parochial schools, support of ministry and teachers, and so on. Voluntaryism in religion has been the American federal law from 1791 until today and gradually became the law of the separate states. By the application of the Fourteenth Amendment to the First Amendment, it is now the one and only American view of church-state relations, nationally, statewise, and locally.[49]

There have been a number of exceptions to this position, both on the part of the law-makers and the judiciary. The recent federal law known as Title III, passed by Congress in 1965, will most certainly open wide this whole question of federal aid to churches and church enterprises. What the Supreme Court does with it remains to be seen.

Tax Exemptions for Churches

Some of the leaders in government, past and present, have adopted the position that all such benefits, activities, and the like constitute establishment of religion, aid to churches, and so on. James Madison was one of these, although Thomas Jefferson, the more articulate of the two, did not oppose such practice.

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[48] Ibid. [49] Ibid.

Justice William O. Douglas is the most prominent contemporary opponent to this. Among other federal aids to religion, all of which he feels to be unconstitutional are:

> Chaplains in both houses of Congress, compulsory chapel services at the three service academies, religious services at federal hospitals and prisons, issuance of religious proclamations by the President, use of the Bible in the administration of oaths, use of the slogan "In God We Trust" by the Treasury Department, reference to Deity in the Pledge of Allegiance, exemption of religious organizations from the income tax, and the grant to them of postal privileges . . .[50]

Tax exemption for churches is, in some sense, a knotty question. On the face of it, exemption from paying taxes is an indirect governmental aid to the church institutions. However, it can be argued, and has, that in paying taxes, the churches then would be in the position of supporting the state. Actually, churches are granted income tax exemption because they are non-profit organizations, and as such, share the same benefit as other non-profit institutions. They are granted property tax exemption because they are of benefit to the community, thus contributing a societal value thereto, and share this status with other non-profit institutions, such as colleges and universities, hospitals, orphanages, to mention a few.

A number of churches, particularly Roman Catholic, carry on business activities and in the past have enjoyed tax exemption for these as being "church-related". However, the application of the First Amendment has gradually removed the tax exemption on their

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[50]Constitution of the United States of America, p. 862.

business properties and activities. This is as it should be, and the decisions to do this seem to be clear-cut and have general public approval, even amongst members of those churches affected by such removal.

It is this writer's opinion that churches and church institutions, as well as all other non-profit institutions enjoying tax exemption, should pay such proportion of the tax which provides them with fire and police protection, since, at present, the entire community "foots the bill" while at the same time not every member of the community benefits from said institutions.

Churches, by the way, benefit from postal regulations in the same way that other non-profit organizations benefit, and not simply because they happen to be churches.

"Religious" Practices in Government

The question involving "religious" practices in governmental observances, such as those enumerated by Justice Douglas, relates directly to the premise concerning the religious posture and emphasis of the nation. To eliminate any of these would be to revert to a complete secularism, with an attitude of irreligion. The consequences of such have already been discussed in this study.

Military Chaplains

Justice Douglas is probably correct in his criticism of compulsory chapel in the service academies. This violates the free exercise clause of the First Amendment and should be discontinued. A

number of military chaplains, of whom the writer is one, feel that compulsory chapel violates freedom of religion. It should be abolished in the recruit training camps also.

Chaplains in the armed forces, however, are something else again. There is no violation of the free exercise clause here, nor of the establishment clause, for that matter. Clergymen from all branches of Christendom, as well as from non-Christian religious groups, are eligible to serve as chaplains, and once in the service, minister to men of all faiths, and of no faith either, if the latter desire it. Also, although a religious ministry is primary, the chaplains serve many other needs of the personnel as well, coming under the category of "morale and welfare", and the sustaining of moral standards within the military.

When men and women enter the armed forces (particularly by induction), leaving their normal and familiar environment, the government has an obligation to provide them with the essential social, and morale building services, including religious services. Especially is this true in isolated outposts, where chaplains visit the men on a regular basis.

A special report on Church and State from the writer's denomination (United Presbyterian, USA) suggests that the chaplains chould be civilians and each paid by the church he represents. This would still be open to any supposed violation of the amendment simply by virtue of the fact that the military allowed such "sectarian" ministries. Also, such a plan would be open to the criticism that in

thus providing chaplains for the armed forces, the churches would be "supporting the state". With the military providing chaplains for its personnel, paying and outfitting them, such a criticism could not be sustained. Furthermore, if the churches had to foot the bill, the smaller denominations would be virtually denied a participation in such ministry if they would be required to finance it themselves.

But the main difficulty that would be encountered, were the above suggestion implemented, is that which is peculiar to the military. The chaplain needs to be a part of the military organization, just as the doctors and the dentists and the engineers, in order to serve most effectively the needs of the personnel.

Coins, Flag Salute, National Anthem

With respect to the "evidences of religion" on the coins of the nation, in the flag salute, and the national anthem, it simply needs to be reiterated that they are there because ours is a religious country and we are a religious people. The same can be said for chaplains in the Congress, prayers being said as the Congress daily begins its deliberations, invocations and benedictions at inaugurations, the use of the Bible in administering oaths of office, to mention a few. (The Bible is used in connection with oaths, by the way, because of the ethical values contained therein, rather than for its doctrinal connotations. Were a Muslim to assume a state office in this country, he would take the oath on the Koran for the same basic reason.)

Rights of Majority and Minority

This, intrinsically, is a difficult question, both for

legislation and for adjudication. Fundamentally, of course, the Constitution was designed and adopted to protect the rights of all our citizens, and not just those of the majority.

However, when do the rights of the minority become so numerous, or weighted, that they deny the majority its "unalienable rights"? This is particularly a problem in the area of religious freedom. The non-religious, the so-called atheists, have become more militant in their zeal for freedom from religion than religious persons are for freedom of religion. At what point can the former have his reverse freedom without denying others their religious freedom?

It may be recalled that much of the history surrounding the First Amendment used the term "freedom of conscience", almost, in some instances, synonymously with "freedom of religion". And yet the religious clause of the Amendment speaks of nothing but religion, although there are other matters of conscience (enumerated in the following clauses of the Amendment).

This is because the founding fathers were concerned about one's freedom to believe and express his religious faith. As the discussion of the birth of the First Amendment illustrates[51], they wanted to do nothing that would suggest support of, or comfort to, the irreligious or the non-religious. It is quite ironical, is it not, that a bill to provide free exercise of religion has become quite a powerful weapon in the hands of the non-religious.

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[51] Cf. supra, p. 64.

All would grant that, especially in a free nation such as ours, the non-religious should be as free not to believe as the religious person is free to believe. The question turns on the point at which the freedom to believe is denied by the demands of the minority which does not want to believe. Perhaps the deciding factor should be whether or not the non-believer is being forced by the majority to believe, or act as though he believes, something which he does not believe. If, for example, a prayer is being given at a public school function (such as a graduation exercise or baccalaureate service), the non-believer is not required to participate, or even to be present for that particular portion of the service; his "rights" would be thus protected, without the necessity of denying the majority the right to have prayer at such an exercise.

Baccalaureate services, by the way, could perhaps be accused of violating the First Amendment (and have), but, in general they are quite non-sectarian, couched in general religious terms, rotating the featured speakers amongst clergy of different faiths, non-Christian as well as Christian, and making attendance voluntary rather than mandatory. A more appropriate question would be to ask whether or not they really accomplish anything, and therefore, are they necessary?

In any case, the question of majority versus minority rights is one of the points at which the wisdom and perceptivity of the Supreme Court are, and must be, of necessity, most critical.

Such, then, are some implications for relating the foregoing conclusions to the existential situation, as a way of implementing the

meaning and intent of the religion clause of the First Amendment. There remains to be asked, "Can anything be done about it, and, if so, what?"

A PLEA FOR CLARIFICATION

Stanford H. Cobb states that: "The state has no call to make men religious or moral, but its highest duty is to take care that society shall not be disintegrated by irreligion and immorality."[52] This is a very pertinent observation, particularly in terms of the fact that the United States is a religious nation and its people are a religious people. Now how can the state best "take care that society shall not be disintegrated by irreligion and immorality"?

Following some of the more incendiary decisions of the Supreme Court, particularly the case involving prayer in the public schools of New York, there was much excitement and agitation. Reactions ran all the way from suggesting impeachment of some members of the Supreme Court, to drafting a new amendment to the Constitution.

In view of the agitation stirred up by the decision in the New York case, it may be helpful to recall Justice Goldberg's dissenting opinion. He said:

> It is said, and I agree, that the attitude of the state toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which

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[52]Cobb, op. cit., p. 524.

> the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.[53]

This raises the caution which this writer suggested with respect to the majority-minority rights problem, as it relates to the non-religious. Whatever is to be done, it, of a certainty, must be done in terms of reason and understanding, decently and in order, and without the pressure of emotional impulse or fanaticism.

Suggested Solutions

Differing suggestions have been made as to what should be done. Some have suggested that Congress pass a resolution affirming its own understanding of the religion clause. But this would run afoul of the same problem posed by nine justices of differing opinion. When nine cannot be unanimously reconciled, how can two bodies numbering in the hundreds come to any significant agreement?

Nor would any attempt to impeach members of the Supreme Court be any easier, assuming it would be desirable, which is unlikely. (Although during the preparation of this study, one Supreme Court Justice recently resigned under public and Congressional pressure.) More realistic, so far as the Supreme Court membership is concerned, would be for the executive and legislative branches of the government to exercise more care and wisdom in nominating and confirming appointment of justices to the Court. Having on the Bench justices

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[53]Lowry, op. cit., p. 231.

who are committed to the philosophy of the religious orientation of the nation and the religious concern of its people, would certainly help.

Others have suggested that education and mustering of public opinion is perhaps the best way of getting at the problem. This certainly has its merits, but it would be a very slow process, involving consistent and conscientious study of the Constitutional principles involved in the problem. It certainly should be attempted, both by the churches and by the schools, public and private.

Possible Constitutional Amendment

The most widely proposed solution to the confusion, following the New York decision, is a clarifying Constitutional amendment. This was advocated by the former Bishop of California, James A. Pike, speaking before the Senate Judiciary Committee. A number of Senators and Congressmen indicated approval of at least the idea.

On July 3, 1962, the annual Governors' conference, meeting in Hershey, Pennsylvania, adopted a resolution urging the Congress to draft an amendment to the Constitution which would "make clear and beyond challenge the acknowledgement by our Nation and people of their faith in God and permit the free and voluntary participation in prayer in our public schools".

As the result of this and other similar recommendations, several resolutions were introduced in Congress that year. Most of them are rather lengthy, and quite wordy, dealing primarily with individual issues and problems raised by Court decisions (such as

prayer and religious activities, Bible reading, etc., in the public schools). Perhaps this is the way it should be done, but creating specific exceptions poses problems. What happens in subsequent years, when other problems arise? Will further amendments have to be added? Amending the Constitution is serious business, and involves lengthy and laborious deliberation; amendments are few and far between, and most difficult of ratification.

James A. Pike suggested that the First Amendment be affirmed with a re-statement of the establishment clause. Such a statement might read something like this: In the First Amendment, the clause, 'establishment of religion' means the recognition as an established church of any denomination, sect, or organized religious association.

But this is not as simple as it sounds, either. In the first place, the First Amendment cannot be altered textually, just as the Constitutional text was not altered, as Madison had recommended. Possibly the Bishop did not intend this.

In the second place, such a "re-affirmation", while certainly clarifying the "establishment" clause, would leave the "free exercise" clause still subject to mis-interpretation or misapplication.

In the third place, such a proposal might elicit more opposition than any of the other suggested amendments because of its ambiguity. What does "recognition" mean? This reflects, obviously, the narrow interpretation of the term which suggests only the question of the national government establishing an official church. This study has attempted to show that the phrase an establishment of religion

had a much broader meaning in the thought of the founding fathers.

It would seem to this writer that some sort of clarifying amendment would be the answer to the problem, but rather than tampering with the First Amendment, it should attempt a reaffirmation of the religious concern of this country as a nation and as a people--a factor which has been evident in the life of this land ever since its founding down to the present day. Coupled with such an affirmation, there perhaps could be a statement which would make it incumbent upon the legislature and the judiciary of the nation and the states to give this recognition primary emphasis and support in any laws and the application thereof affecting religious freedom.

The wording of such an amendment must be thoughtfully couched in terms that would be unmistakable to lawmakers and interpreters alike. It might explicitly state the fact that these United States of America have been founded upon religious principles for which our forefathers fought and died; that the people of this nation are a religious people, Christian and non-Christian alike, and that they cherish their great heritage of religious liberty.

In view of this, therefore, it might be provided that the legislative bodies and the judiciary of these United States of America shall be encouraged to hold before them the reality of religious belief and practice in the life of this nation when making and interpreting laws relating to religion and its free exercise.

Such a provision would tend to insure that aggressive atheism and militant secularism would no longer continue to enjoy the

disproportionate advantages they appear to have had in recent litigation, and which threaten those very principles upon which this nation was founded.

Hopefully, something like the above may stimulate further thought and effort in the direction of a possible clarifying emendment to the Constitution.

Concluding Summary

An effort has been made in this study to discern the meaning and the intent of the religion clause of the First Amendment as envisioned in the thought of the founding fathers of this nation. It has found the principles therein to be sound, and the simple wording appropriate to the purpose of the enactment of the Amendment.

It is the conviction of the writer that, even though the years since the drafting of the Amendment and its adoption have brought many changes in the life-style of the people, religion is still a vital part thereof, and therefore the principles inherent in the Amendment are still relevant and very contemporary.

However, it requires an educated, dedicated, religiously concerned public to find and promote the ways and means of insuring an application of the principles which will be meaningful and fair to all the people. Surely, and hopefully, this is not too much to ask or expect of a religious people.

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